No. 80-83

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

EDMUND S. MUSKIE, SECRETARY OF STATE,

Petitioner,

—v.—

PHILIP AGEE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

MELVIN L. WULF
Clark Wulf Levine & Peratis
113 University Place
New York, N.Y. 10003
(212) 475-3232

CHARLES S. SIMS
American Civil Liberties Union Foundation
132 West 43rd Street
New York, N.Y. 10036
(212) 944-9800

Attorneys for Respondent

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE. 1

SUMMARY OF ARGUMENT. 6

ARGUMENT 12

I. THE EXECUTIVE HAS NO AUTHORITY FROM CONGRESS TO REVOKE A PASSPORT FOR THE PURPOSE OF PROTECTING THE "NATIONAL SECURITY OR FOREIGN POLICY OF THE UNITED STATES" 12

A. The Constitutional Background. 12

B. Kent v. Dulles And Its Companion Case, Dayton v. Dulles, Dispose of the Case at Bar. 27

C. The Administrative Practice Involving Denial of Passports for National Security or Foreign Policy Reasons Is Too Insubstantial And Inconsistent to Support a Conclusion That Congress Has Implicitly Authorized the Practice. 35

D. The History of Travel Control Confirms That Congress Has Not Granted the Executive Authority to Impede the Travel of a Citizen Whose Travels Abroad Are Allegedly a Threat to National Security or Foreign Policy Interests. 59

TABLE OF CONTENTS (continued)

Page

E. The Decision Below, Based Solely on Statutory Grounds, Does Not Interfere With the Executive's Ability to Conduct Foreign Affairs And Protect National Security . 97

II. THE SECRETARY'S REVOCATION OF RESPONDENT'S PASSPORT IS CONSTITUTIONALLY INFIRM. 102

A. The Secretary's Revocation of Respondent's Passport Impermissibly Burdens His Right to Travel 102

B. Revocation of Respondent's Passport Was Intended to Harass, Penalize, and Deter His Criticism of United States Policies and Practices, In Violation of the First Amendment. 112

C. Summary Revocation of Respondent's Passport Prior to Any Notice or Opportunity to be Heard Violates the Due Process of the Fifth Amendment. . . 116

CONCLUSION 125

TABLE OF AUTHORITIES

Cases	Pages
Arnett v. Kennedy, 416 U.S. 134 (1974)	120
Aptheker v. Secretary of State, 378 U.S. 500 (1964)	passim
Bauer v. Acheson, 106 F.Supp. 445 (D.D.C., 1952)	118
Bell v. Burson, 402 U.S. 535 (1971)	119
Califano v. Aznavorian, 439 U.S. 170 (1978)	102,104
Califano v. Jobst, 434 U.S. 47 (1977)	105
Dayton v. Brinkman, 433 U.S. 406 (1977)	114
Dayton v. Dulles, 357 U.S. 144 (1958)	passim
Dixon v. Love, 431 U.S. 105 (1977)	121
Duncan v. Kahanamoku, 327 U.S. 308 (1946)	59
Ex Parte Endo, 323 U.S. 283 (1944)	59
FMC v. Seatrain Lines, Inc., 411 U.S. 726 (1973)	36
Fuentes v. Shevin, 407 U.S. 67 (1972)	119

Cases	Pages
Goss v. Lopez, 419 U.S. 565 (1975)	119
Greene v. McElroy, 360 U.S. 474 (1959)	22,59
Gutknecht v. United States, 396 U.S. 295 (1970)	59
Harris v. MacRae, 65 L.Ed. 2d 784 (1980)	69
Jenkins v. McKeithen, 395 U.S. 411 (1969)	3
Kent v. Dulles, 357 U.S. 116 (1958)	passim
Lynd v. Rusk, 389 F.2d 940 (D.C. Cir. 1967)	passim
MacKenzie v. Hare, 239 U.S. 299 (1915)	99
Mackey v. Montrym, 443 U.S. 1 (1979)	120,124
Mathews v. Eldridge, 424 U.S. 319 (1976)	passim
New York Telephone Co. v. New York Labor Dept., 440 U.S. 519 (1979)	81
New York Times v. United States, 403 U.S. 713 (1971)	107,114
NLRB v. Fruit and Vegetable Packers, 377 U.S. 58 (1964)	59

Cases — Pages

North Georgia Finishing, Inc., v. Di-Chem, Inc., 419 U.S. 601 (1975).....119

Roe v. Wade, 410 U.S. 113 (1973)..... 69

Schneider v. Smith, 390 U.S. 17 (1968)..... 41

SEC v. Chenery, 332 U.S. 194 (1947).....114

Sirhan v. Rogers, diss'g. appeal No. 35364 (Sept. 11, 1970)..... 46

Snepp v. United States, 444 U.S. 507 (1980).....100,114

Teamsters v. Morton, 377 U.S. 252 (1964)..... 81

United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936)..... 97,99

United States v. Laub, 385 U.S. 475 (1967).....passim

University of Missouri v. Horowitz, 435 U.S. 78 (1978)....120

Woodward v. Rogers, 344 F.Supp. 974 (D.D.C. 1972), aff'd. summarily, 486 F.2d 1317 (D.C. Cir. 1973)..... 20,21,22

Cases — Pages

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1953).....passim

Zablocki v. Redhail, 434 U.S. 374 (1978).....105

Zemel v. Rusk, 381 U.S. 1 (1965).....passim

Statutes and Regulations

Act of Feb. 4, 1815, c.31, §10 3 Stat. 199..... 68

Act of May 22, 1918, ch. 81, §10, 40 Stat. 559..... 68

Act of Nov. 10, 1919, c. 104, 41 Stat. 353..... 71

Act of March 3, 1921, c. 136, 41 Stat. 1359..... 70

Internal Security Act of 1950, ch. 1024, Title I, §2, 64 Stat. 987..... 30,52,112

National Emergencies Act, Title I, §101, P.L. 94-412, 90 Stat. 1255 (1976)..... 88

11 Stat. 60 (1856)..... 64

66 Stat. 190 (1952)..... 77

92 Stat. 985..... 95

Statutes and Regulations — Pages

8 U.S.C. §1105..... 78

8 U.S.C. §1185.....passim

22 U.S.C. §211a.....passim

50 U.S.C. §781..... 30

50 U.S.C. §1601..... 88

F. R. Civ. P. 12(b)(6)..... 2

22 C.F.R. 51.70(a)(1)..... 17

22 C.F.R. §51.70(b)(4).....passim

22 C.F.R. §51.80..... 4

22 C.F.R. §51.135.....passim

Other Authorities

Agee, Inside the Company:
A CIA Diary (1975)..... 99

Boudin, The Constitutional Right
to Travel, 56 Columbia L.Rev.
47 (1956)..... 65

Conf. Rep. 2096, 82nd Cong.,
2d Sess., reprinted in 1952
U.S. Code Cong. and Adm.
News 1688..... 79

Cong. Globe, 34th Cong., 1st
Sess. 1797 (1856)..... 65

Other Authorities — Pages

56 Cong. Rec. 6066-6067 (1918).... 69

58 Cong. Rec. (1919):
p. 7301..... 70
p. 6974..... 70
p. 6971..... 70
p. 6976..... 71

59 Cong. Rec. (1920):
pp. 7124, 7166-7175..... 72
pp. 7190-7191, 7173, 7166..... 72
pp. 7167, 7175, 7748-50..... 72
p. 9407..... 73

67 Cong. Rec. 11705 (1926)..... 73

87 Cong. Rec. (1941):
p. 5325..... 76
p. 5050..... 76
pp. 5387-88..... 77

94 Cong. Rec. A5182 (1948)..... 45

104 Cong. Rec. (1958):
p. 13335..... 81
p. 13337..... 81
p. 19654..... 81
p. 15823..... 82
pp. 19654-5..... 82

107 Cong. Rec. 10327 (1960)..... 84

124 Cong. Rec. 4689 (daily ed. May 31, 1978)..... 88,89

124 Cong. Rec. S9973 (daily ed. June 28, 1978)..... 95

Other Authorities	Pages
Department of State, The American Passport (1898).....	63,65,69
Department of State, Papers Relating to the Foreign Relations of the United States (1899).....	48
Department of State, Papers Relating to the Foreign Relations of the United States, Pt. 2 (1907)....	42
Department of State, Papers Relating to the Foreign Relations of the United States (1914)(Supp.).....	48
Department of State, The United States Passport (1976)..	48
T. Ehrlich, Passports, 19 Stan. L.Rev. 129 (1966).....	86
G. Hackworth, 3 Digest of International Law (1942).....	44,51
5 Hearings Before the President's Commission to Investigate the Assassination of President Kennedy (1964).....	57
Hearings on Appropriations for the Department of State for 1966, House Committee on Appropriations, 89th Cong., 1st Sess. (1965).....	57

Other Authorities — Pages

Hearings on Denial of Passports to Persons Knowingly Engaged in Activities Intended to Further the International Communist Movement Before the House Committee on Foreign Affairs, 85th Cong., 2d Sess. (1958)..... 85,86

Hearings on Extension of Passport Control, H.J.Res. 205 and H.R. 9782 Before the House Committee on Foreign Affairs, 66th Cong., 1st Sess. (1919)..... 74

Hearings on H.R. 3884 Before the House Judiciary Committee, 94th Cong., 1st Sess. (1976).... 88

Hearings on Passport Legislation Before the Senate Committee on Foreign Relations, 85th Cong., 2d Sess. (1958)..... 52

Hearings on Passport Legislation Before the Senate Committee on Foreign Relations, 86th Cong., 1st Sess. (1959)..... 54,83,84

Hearings on Providing Standards for the Issuance of Passports and for Other Purposes Before the House Committee on Foreign Affairs, 86th Cong., 1st Sess. (1959)..... 55

Other Authorities — Pages

Hearings on Validity of Passports Before the House Committee on Foreign Affairs, 69th Cong., 1st Sess. (1926)..... 73

H.Rep. 485, 65th Cong., 2d Sess. (1918)..... 68

H.Rep. 985, 66th Cong., 2d Sess. (1920)..... 72

New York Post, December 17, 1979..... 4

New York Times, July 12, 1954..... 45

13 Op. Attn'y Gen. 397 (1871).... 47

15 Op. Attn'y Gen. 114 (1876).... 47

17 Op. Attn'y Gen. 674 (1884).... 47

23 Op. Attn'y Gen. 509 (1901).... 66

Public Papers of the Presidents, Dwight D. Eisenhower (1958).... 53,54,80

Reorganization of the Passport Functions of the Department of State, Senate Committee on Government Operations, 86th Cong., 2d Sess. 20 (1960) (Comm. print)..... 63

The Right to Travel: Hearing on S. Res. 49 Before the Senate Sub-Committee on Constitutional Rights, 85th Cong., 2d Sess. (1958)..... 38

Other Authorities	Pages

S.Rep. No. 95-842, 95th Cong., 2d Sess. (1978)..... 92,93,94

S.Rep. No. 95-1535, 95th Cong., 2d Sess. (1978), reprinted at 1978 U.S. Code Cong. and Ad. News 2478..... 90,93

Stowell, The Legal Adviser of the Department of State, 5 International Law and Relations 1 (1936)..... 65

Tribe, American Constitutional Law (1978).....112

Webster, A Treatise on the Law of Citizenship in the United States (1891)..... 65

Wharton, International Law Digest (1886)..... 48

STATEMENT OF THE CASE

Petitioner's statement of the case correctly describes the affidavits filed by government officials in this case.[1/] With a notable exception referred to below, Mr. Agee and counsel did not believe it was necessary to contest the government's affidavits point by point, since the theory of the case, which has been sustained by both courts below, is that the Secretary of State has no Congressional authorization to deny or revoke passports under 22 C.F.R. §51.70(b) no matter what accusations might be made against a citizen. For that reason, counsel conceded below, but only for the

---

[1/] Affidavits submitted to support stay applications, as were most of petitioner's affidavits, were not before the District Court when it ruled on the summary judgment motions, and are therefore not properly part of the record on certiorari.

purpose of squarely challenging the Secretary's authority, that Mr. Agee's activities have caused serious damage to the national security or foreign policy of the United States.[2/]

The significance of that factual concession is no different than if the Secretary, rather than cancelling Mr. Agee's passport, had filed suit to revoke it, had alleged in his complaint the same facts contained in the present affidavits, and Mr. Agee had responded with a motion to dismiss under Rule 12(b)(6), F. R. Civ. P., as the procedural device for raising the question whether the Secretary's assertion of power under §51.70(b)(4) was authorized

---

[2/] See Joint Appendix (J.A.) 10-13; 21-22, ¶6 n.1; 23, ¶¶6,7.

by Congress. In that posture, the allegations in the complaint would be taken as true only for the purposes of the motion, but not for any other purpose. Jenkins v. McKeithen, 395 U.S. 411, 421 (1969).

Thus, the government is incorrect in asserting that Mr. Agee "waived his right to an administrative hearing" (Br. 2 n.1, 7). Mr. Agee's theory, which was specifically alleged in the complaint (Para. 9), made clear in the District Court (JA 23), and understood by the district judge (JA 15), was that it was unnecessary to exhaust administrative remedies as a prerequisite to challenging the Secretary's statutory authority to act at all, and that should Mr. Agee ultimately not win on that ground, he would then pursue his administrative remedies. In addition, in a cable to the United States Consul, Hamburg, West Germany, dated

February 19, 1980, which is not in the record, counsel formally and timely requested a hearing for Mr. Agee under Sections 51.80 et. seq. "subject to the disposition of the lawsuit on his behalf now pending in the District of Columbia."3/

The one factual accusation which Mr. Agee contested below was a report contained in the New York Post of December 17, 1979, submitted by government counsel in opposition to Mr. Agee's motion for a temporary restraining order, that Mr. Agee had been invited to travel to Iran to participate in a tribunal involving the American hostages who had recently been taken into captivity (Pet. App. 103a). Since Mr. Agee had received no such invitation and

---

3/ Under the regulations, Mr. Agee is entitled to a trial type hearing upon revocation of his passport. 22 C.F.R. §51.80 ff.

would not have accepted it under any circumstances (JA 29-30), and the government's use of the false report from the New York Post, a notoriously unreliable newspaper and the only one in the country in which the report appeared, was such an obvious and deceitful attempt to prejudice the court against Mr. Agee, the accusation was challenged as a matter of principle.4/

Mr. Agee does not dispute that he has openly and publicly criticized the Central Intelligence Agency's activities abroad. He believes that the "CIA continues to intervene on the side of 'friends' whose property and privilege rest on the remnants of archaic social systems long since discredited" (C.A.App.70). He has, of course, the right to hold and express those opinions.

4/ The government's description of the report is as unreliable as the report itself. The government says that the Post reported that Mr. Agee "had been invited" to Iran (Br. 5). Actually, the report said only that Mr. Agee was identified by an anonymous Iranian diplomat as a "candidate" for an invitation, not that the invitation had been extended. Court of Appeals Appendix (CA App.) 92.

SUMMARY OF ARGUMENT

I. A. Kent v. Dulles, 357 U.S. 116 (1958), and Zemel v. Rusk, 381 U.S. 1 (1965), read together, hold that the right to travel is a part of the liberty of which a citizen cannot be deprived without due process of law under the Fifth Amendment. That right can only be abridged pursuant to the law-making functions of Congress. The only explicit or implicit authority found in those cases to have been granted by Congress to the Executive Branch relates to citizenship, illegal activities, and area restrictions. Because Congress has not explicitly authorized revocations for the reasons relied on by the Secretary here--danger to the national security or foreign policy of the United States--implicit authorization must rest upon a substantial and consistent administrative practice which is sufficient to warrant the conclusion that it has been approved by Congress.

B. As shown below, there is no historical practice authorizing revocation of respondent's passport on the grounds asserted by the Secretary in this case. However, short of that conclusion, Kent and Dayton v. Dulles, 357 U.S. 144, establish on their facts the invalidity of the action taken. The purpose of the power asserted and held invalid in those cases--the right to withhold passports from Communist Party members and supporters--is functionally indistinguishable from the power asserted in this case: the right to withhold passports from citizens whose activities abroad threaten the national security or foreign policy of the United States. The dissenting opinion in Kent (and the majority opinion in Dayton) demonstrate explicitly that passports were withheld in those cases to protect the national security or foreign policy of the United States. Since there has been no subsequent Congressional authorization for refusal of passports on those grounds, Kent and Dayton control this case.

C. To establish the historical practice which is the prerequisite to finding implied Congressional authorization, the government relies on seven actions, ostensibly on national security grounds, from 1906 to 1970. Only one of those is unambiguously identical to the power asserted in this case; the others are either closely related to illegal activity, for which passports may be refused as held in Kent, or are so ambiguously related to national security or foreign policy as to be an insufficient basis upon which to rest the denial of a constitutionally-protected liberty. As the court below held, "such evidence hardly amounts to a 'substantial and consistent administrative practice.'" In addition, ranking government officials made it clear to Congress that they believed that the Kent decision prohibited refusals of passports for national security or foreign policy reasons, and explicitly requested legislation to reverse the result of Kent.

After close attention, Congress refused to pass such legislation.

D. The legislative history confirms the Executive's lack of discretion here. Congress has consistently rejected peacetime travel controls. In 1918 and 1941, when wartime controls were imposed, Congress expressly decided that travel control would not extend into peacetime. In 1919 and 1921, Congress expressly rejected administration-sponsored attempts to impose peacetime controls, and the 1926 Act must be read in light of that strong Congressional opposition to travel control. Kent and Dayton held that the 1952 Act did not authorize peacetime travel controls on national security grounds. The 1978 Congress expressly legislated to facilitate travel by withdrawing most area control authority and eliminating any penalties for traveling without a passport.

E. The decision below, which rested on a statutory ground, does not interfere

with the Executive's exercise of foreign affairs responsibilities, and if it did, the Executive's recourse would be to Congress, not the courts. Invocation of the spectre of national security cannot create powers to abridge liberty that Congress has not conferred. Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579 (1952).

II. Assuming arguendo that the revocation is statutorily authorized, it nevertheless violated respondent's constitutional rights.

A. The revocation impermissibly abridged respondent's right to travel. As the administrative practice the Secretary relies on demonstrates, the standard for regulation also sweeps too broadly.

B. The government is forbidden by the First Amendment from restricting, as it has here, the right to travel in order to deter or suppress political speech.

C. Due process requires at least notice and an informal opportunity to be heard prior to the summary deprivation of liberty. The failure to afford respondent any of these basic requirements prior to summary revocation of his passport violated his right to procedural due process.

ARGUMENT

I. THE EXECUTIVE HAS NO AUTHORITY FROM CONGRESS TO REVOKE A PASSPORT FOR THE PURPOSE OF PROTECTING THE "NATIONAL SECURITY OR FOREIGN POLICY OF THE UNITED STATES".

A. The Constitutional Background

This Court held in Kent v. Dulles, 357 U.S. 116 (1958), that "the right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment" (id. at 125), that the Secretary of State does not have "unbridled discretion to grant or withhold a passport from a citizen for any substantive reason he may choose" (id. at 128), and "if that liberty is to be regulated, it must be pursuant to the law-making functions of Congress" (id. at 129). In Zemel v. Rusk, 381 U.S. 1, 12 (1965), the Court held that if implicit Congressional authorization for restriction on travel of American citizens

is to be found at all, it must rest upon an "administrative practice sufficiently substantial and consistent to warrant the conclusion that Congress had implicitly approved it".

In this case, the government does not claim explicit authorization for Sec. 51.70 (b)(4), but only implicit authorization. The court below was unable to find the necessary foundation for implicit authorization. It held that the government's five "scattered examples" of passport refusals "which were even arguably for national security or foreign policy reasons" did not "amount to a 'substantial and consistent administrative practice'" (Pet. App. 13a-14a), and that the Secretary's reliance on "a series of statutes, regulations, proclamations, orders and advisory opinions dating back to 1856" (Pet. App. 14a) was irrelevant since "the criterion

for establishing congressional assent by inaction is the actual imposition of sanctions and not the mere assertion of power" (Pet. App. 15a), as Kent v. Dulles held, 357 U.S. at 127.5/

Mindful of its own principle that it will "construe narrowly all delegated powers that curtail or dilute the right to travel" (id. at 129), this Court must come to the same conclusion.

Before we give our close attention to the legislative history and administrative practices relevant to this case, we will review the cases which demonstrate how the principles announced in Kent v. Dulles have been strictly applied by this Court

---

5/"The difficulty is that while the power of the Secretary of State over the issuance of passports is expressed in broad terms, it was apparently long exercised quite narrowly."

and the lower federal courts to serve the constitutionally protected right to travel. We begin with a closer description of Kent v. Dulles, because we believe that, in addition to stating the guiding principles to be applied in this case, it also disposes of this case on its facts, as we show below.

In Kent v. Dulles, the Secretary of State denied two persons passports under regulations purporting to protect the "national interest" by prohibiting issuance of passports to members of the Communist Party, or to persons who "engage in activities which support the Communist movement" or "are going abroad to engage in activities which will advance the Communist movement for the purpose, knowingly and willfully of advancing that movement." 357 U.S. at 117 n.1. The regulations, which were promulgated under

the purported authority of 22 U.S.C. §211a, the same statutory provision relied upon here, declared that "In order to promote the national interest by assuring that persons who support the world Communist movement...may not, through the use of United States passports, further the purposes of that movement," passports would not be issued to Communist Party members or supporters.

On the basis of the constitutional principles relating to the requirement of Congressional authority for refusal of passports by the Executive, this Court found that the regulations were unauthorized and invalid.

In reviewing the history of passport control, the Court found that Congress had authorized passport refusals in only two categories of cases: where the applicant was neither a citizen nor otherwise owed

allegiance to the United States, and where the applicant "was participating in illegal conduct, promoting passport frauds, or otherwise engaging in conduct which would violate the laws of the United States." 357 U.S. at 127.[6/]

In Kent, as in the case at bar, the government argued, based upon the broad language of §211a and 8 U.S.C. §1185, that the Secretary of State had broad discretion in the passport field. The Court rejected that argument. Acknowledging that under §211a and its predecessor, "The Scholars, the courts, the Chief Executive, and the Attorneys General" all said that the issuance of passports is "a discre-

---

[6/] The Secretary's stated purpose in revoking Mr. Agee's passport did not rest on any of these grounds.

Sec. 51.70(a)(1) requires refusal of a passport to a citizen who "is the subject of an outstanding Federal warrant of arrest for a felony...", as the Court of Appeals noted. Pet. App. 16a n.10.

tionary act," the Court held, nonetheless, that the controlling consideration was "the manner in which the Secretary's discretion was exercised, not in the bare fact that he had discretion." 357 U.S. at 124-125. The basis for the narrow holding was the Court's recognition of travel as a constitutionally protected right. As such, "we will not readily infer that Congress gave the Secretary of State unbridled discretion to grant or withhold [passports]." Id. at 129.[7/]

Seven years later, in Zemel v. Rusk, the question before the Court was the validity of an area travel ban imposed by the Secretary of State to prohibit travel by all United States citizens to Cuba. The Court confirmed its holding in Kent

---

[7/] The conclusion rested upon the legislative history and construction of both §211a and 8 U.S.C. §1185. 357 U.S. at 128, 129, 130.

that the Secretary's power to limit a citizen's travel must rest on statutory authorization from Congress. However, the Court found that, in the absence of explicit authority by Congress, area restrictions were valid because they were part of a longstanding "administrative practice sufficiently substantial and consistent to warrant the conclusion that Congress had implicitly approved it" when §211a was adopted in 1926. 381 U.S. at 12. The finding rested on proof of actual and widespread implementation of area restrictions for a decade before 1926, and afterwards. 381 U.S. at 8-11. [8/]

[8/] In terms directly applicable to the case at bar, the Court contrasted its Zemel and Kent decisions. Kent, the Court held, conclusively decided that the 1926 Congress forbade the Secretary power to deny passports by reason of "the character of the particular applicant." Id. at 13. Zemel, however, was a decision based upon "foreign policy considerations affecting all citizens." Ibid. Emphasizing the point, (footnote cont'd next page)

Two other cases, both from the District of Columbia Circuit, demonstrate the consistent judicial understanding of the Kent doctrine.

The first, Woodward v. Rogers, 344 F.Supp. 974 (D.D.C. 1972), aff'd. summarily, 486 F.2d 1317 (D.C. Cir. 1973), was a suit challenging the State Department requirement that an oath of allegiance be executed as a condition to issuance of a passport.

(footnote cont'd from previous page)

the Court observed that Zemel's claim "is different from that which was raised in Kent v. Dulles...for refusal to validate appellant's passport does not result from any expression or association on his part; appellant is not being forced to choose between membership in an organization and freedom to travel." Id. at 16. The Court reaffirmed that denials based on factors related to an applicant's conduct were not authorized by the 1926 Act, which "authorized only those passport refusals and restrictions 'which it could fairly be argued were adopted by Congress in light of prior administrative practice.'" Id. at 17 (citations omitted).

The Department had required such an oath from 1861 to 1966, but it was eliminated in 1966. In 1971, the Department attempted to reinstate the oath requirement by issuing instructions to its employees to that effect. 344 F.Supp. at 981. Searching the legislation for explicit authorization for the oath, the court concluded that none existed. Id. at 983-985. But the government argued that, given the prior longstanding requirement, legislative sanction was to be implied from the failure of Congress to affirmatively prohibit the oath requirement. The court rejected that argument out of hand on the ground that "the Supreme Court has made it plain that only the clearest of such evidence will permit this Court to consider Congressional silence to be a substitute for explicit and affirmative legislative action in limiting the free exercise of important rights. See, e.g.,

Greene v. McElroy, 360 U.S. 474 (1959), Kent v. Dulles, 357 U.S. 116, 129 (1958), ..." Id. at 985. The Court distinguished the implicit authorization found in Zemel on the ground that "that decision was reached only after an exhaustive review of State Department precedents, detailed and specific Executive Orders and subsequent legislation convinced the Court that Congress had delegated the authority to refuse to validate passports of United States citizens for travel to Cuba." Id. at 985-986.

In Lynd v. Rusk, 389 F.2d 940 (D.C.Cir. 1967), the question was whether the Secretary could enforce compliance with area restrictions -- as allowed in Zemel -- by withdrawing a passport from a citizen who declined to give assurance that he would not travel to the designated areas. The appellant had stated that he

would not use his passport to travel to restricted areas, but reserved the right to travel to those areas without using a passport. Because of that reservation, the Secretary revoked Mr. Lynd's passport, and he was effectively barred from traveling abroad.

Noting "the constitutional dimension of the right to travel," 389 F.2d at 942, and that, under Kent v. Dulles, statutory limits on the right to travel "will be strictly construed", id. at 945, the Court concluded that there was no "basis for inferring that Congress has given the Secretary the authority to deny legitimate, constitutionally protected travel [to areas which are not restricted], merely because that is a technique which provides greater assurance of hindering travel to designated areas." Id. at 946.

Significantly, the government's claim

in Lynd rested on the assertion that enforcement of the area restrictions was important because travel to those areas by United States citizens "would be inimical to the nation's foreign relations." Id. at 941. But invocation of that spectre was inadequate to overcome the strict rule that the Secretary of State's power to invade the constitutionally protected right to travel would be very narrowly construed.

Aptheker v. Secretary of State, 378 U.S. 500 (1964), shows that, even when Congress has adopted legislation which attempts to limit the issuance of passports for reasons, which, as here, involved national security or foreign policy considerations, this Court has jealously protected the constitutional right to travel.

Aptheker involved the validity of a

provision of the Subversive Activities Control Act, 50 U.S.C. §785, prohibiting members of the Communist Party, after the Party was required to register under the Act, from applying for or using passports. The Court held the provision unconstitutional on the ground that it "too broadly and indiscriminately restricts the right to travel and therefore abridges the liberty guaranteed by the Fifth Amendment." Id. at 504.

Noting that the statute "flows... from the congressional desire to protect our national security" (id. at 509), the Court nonetheless held that it was impermissibly broad (id. at 508), that there were "less drastic means for achieving the same basic purpose" (ibid.); that there was no relationship between the fact of membership in the Communist Party and the individual's commitment to

its illegal purposes (id. at 511), and that the statutory prohibition "applies regardless of the purposes for which an individual wishes to travel" (Ibid). In conclusion, the Court characterized the statute as "not a regulation 'narrowly drawn to prevent the supposed evil', cf. Cantwell v. Connecticut, 310 U.S. at 307, yet here, as elsewhere, precision must be the touchstone of legislation so affecting basic freedoms..." (Id. at 514).

Thus, even where the Congress has adopted legislation affecting issuance of passports, this Court, in protecting the constitutional right to travel, imposed demanding standards which the statute was unable to satisfy. 9/

9/ The constitutional right to travel also contributed to this Court's refusal to allow prosecution of citizens who traveled to countries for which United States passports were invalid. United States v. Laub, 385 U.S. 475 (1967).

B. Kent v. Dulles And Its Companion Case, Dayton v. Dulles, Dispose Of The Case At Bar.

The facts of Kent and Dayton v. Dulles, 357 U.S. 144, and the regulation which they involved, dispose of the case at bar without the need for further inquiry into the question of Congressional authorization. We believe that, having held that the regulation in Kent and Dayton was unauthorized, the Court must come to the same conclusion here, for the three cases are functionally indistinguishable.

The regulation involved in Kent and Dayton, 22 C.F.R. §51.135,[10/] declared that "In order to promote the national interest by assuring that persons who support the world Communist movement...

10/ See 357 U.S. at 177 n.1.

may not, through the use of United States passports, further the purposes of that movement," passports would not be issued to Communist Party members or supporters.

The facts of both cases, as well as common sense, support the obvious conclusion that the purpose of §51.135 was identical to the purpose of §51.70(b)(4) -- to protect the national security or foreign policy of the United States.

First, in the perpetual post-World War II international competition between the United States and the Soviet Union, the interests at stake have never been defined as involving anything less than the national security and the foreign policy of the United States. Whatever served the Soviet Union's national security and foreign policy was seen to injure the United States' national security and foreign policy, and vice versa. Sec.

51.135 directly served that struggle. It announced that its purpose was "to promote the national interest" of the United States, declared that the use of United States passports by American Communists and supporters would "further the purposes" of the Communist movement, and therefore forbad issuance of passports to such individuals. Thus, United States citizens who were members of the Communist Party, or supporters of the Party, were to be forbidden to travel abroad for fear that they would assist the world Communist movement, and thus injure the national security or foreign policy of the United States.

The regulation speaks clearly, and it speaks for itself. There is no other possible interpretation. The regulation is based on the assumption that travel abroad by American Communists would be

harmful to the interests of the United States. [11] It would strengthen the hand of the Soviet Union, we may speculate, by facilitating the receipt of funds, political instruction, or propaganda techniques by the American travelers, or, we may speculate, it would facilitate the exchange of information or instructions concerning espionage and sabotage activities. Whatever the danger was seen to be, it was certainly seen as injuring the national security or foreign policy of the United States, for that is what the history of the world has been all about for the last thirty-five years.

The Kent and Dayton opinions explicitly support our argument. Dissent-

---

[11] Congress expressly so found in the Internal Security Act of 1950, ch. 1024, Title I, §2, 64 Stat. 987, codified at 50 U.S.C. §781(8) and (15). In light of those findings, Kent and Dayton cannot be dismissed as merely concerning "beliefs and associations."

ing in Kent, Mr. Justice Clark describes the majority opinion as "holding that the Secretary has not been authorized to deny a passport to a Communist whose travel abroad would be inimical to our national security" (357 U.S. at 137); he believes that "Congress meant the Secretary to deny passports to those whose travel abroad would be contrary to our national security" (id. at 132); he cites legislative history which refers to "means which may be adopted by hostile nations to secure military information or spread propaganda and discontent" (id. at 133); he asserts that to allow the Secretary "to exercise his traditional passport function...would effectively add to the protection of this country's internal security" (id. at 135); he cites legislative history which supports the Secretary's power "to block travel to

and from the country by those persons whose passage would not be in the best interests and security of the United States" (id. at 136), which refers to "espionage and subversive activities" (ibid.), and which states that "passports should be refused to persons whose purpose in traveling abroad was believed to be to subvert the interest of the United States" (id. at 139); and he alludes to "other evidence of peacetime denials for security reasons". (id. at 140).

It blinks reality to say that the regulation in the Kent case involved anything else but the "national security or foreign policy of the United States."[12/]

[12/] The government asserts (Br. 33 n.26) that the majority in Kent held that "there was no nexus between mere
(footnote cont'd next page)

Dayton provides still further support for the irresistible conclusion that Sec. 51.135 involved national security or foreign policy. The government's brief in Dayton before this Court stated (p. 44) that the objective of Sec. 51.135 was "to prevent the departure and entry of citizens when such departure or entry is reasonably likely to be inimical to the national safety in times of peril." Dayton's passport was refused based on findings that he was "part of the Rosenberg espionage ring and...presen[t] at an apartment...which was allegedly used for

---

(footnote cont'd from previous page)
communistic beliefs and harm to national security. Id. at 128." Kent, of course, held no such thing. At the passage cited, Kent declined to equate the dangers posed by travel of Communists abroad with the dangers posed to the nation in time of war. But it did not hold that travel of Communists abroad had no affect on national security or foreign policy; Dayton is squarely contra to that proposition.

microfilming material obtained for the use of a foreign government." 357 U.S. at 146, 152. Yet the Court held that these findings of involvement in crime for which the Rosenbergs had been convicted "show only a denial of a passport for reasons which we have today held to be impermissible." Id. at 150.

Clearly, the Kent-Dayton regulation had the very same purpose as does §51.70(b)(4). That regulation having been held unauthorized in Kent, and Congress not having adopted any explicit authorizing legislation since then, the Court must conclude that §51.70(b)(4) is as unauthorized today as the indistinguishable Sec. 51.135 was twenty-three years ago.

C. The Administrative Practice Involving Denial of Passports For National Security Or Foreign Policy Reasons Is Too Insubstantial And Inconsistent To Support A Conclusion That Congress Has Implicitly Authorized The Practice.

Kent and Zemel hold that implicit Congressional authorization to prohibit the constitutional right to travel can be found only where there is a substantial and consistent history of actual imposition of the restrictions on travel sought to be justified in any particular case. In the case at bar, therefore, unless the Court finds such a substantial and consistent history of the denial of passports by the Secretary of State based upon "activities abroad [which] are causing or are likely to cause serious damage to the national security or foreign policy of the United States," the revocation of Mr. Agee's passport, and the denial of his constitutional right to travel,

must be held invalid. Cf. FMC v. Seatrain Lines, Inc., 411 U.S. 726, 746 (1973).

The government's entire case for showing a substantial and consistent practice rests on the following events: a 1906 denial of a passport to a citizen who became a notorious promoter of gambling and prostitution in China (Br. 29); a 1907 denial of a passport to a citizen in Cairo who "was engaged in blackmailing projects, and was disturbing or endeavoring to disturb the relations of this country with the representatives of foreign countries" (Br. 30); a 1917 denial of passports to several Socialists who intended to attend a "quasi-official conference" in Stockholm (Br. 30); a 1921 denial of a passport to a parolee on grounds of

"international comity" (Br. 30); a 1948 denial of a passport to a Congressman going abroad to attend a conference on an ongoing Greek rebellion (Br. 39); a 1954 revocation of the passport of an American gun runner (Br. 39); and a 1970 revocation of the passports of two citizens intending to travel to the site of an international hijacking (Br. 39).

In addition, the government presumes also to rely (Br. 40 n.30) on "57 passports revoked or denied in 1956 because passport holder had engaged in either 'illegal activities or activities prejudicial to the orderly conduct of foreign relations.'" Those are very dubious and necessarily useless figures. A more descriptive tabulation of 1956 passport refusals states that ten were refused to "Participants in political affairs abroad whose activities were

deemed harmful to good relations and persons whose previous conduct abroad has been such as to bring discredit on the United States and cause difficulty for other Americans (gave bad checks, left unpaid debts, had difficulty with police, etc.)". The Right to Travel: Hearing on S. Res. 49 Before The Senate Sub-Committee on Constitutional Rights, 85th Congress, 2nd Sess. 129 (1958). The discrepancy in the figures between the two reports, their unilluminating descriptions, and their admixture of illegal, political and foreign policy categories make both sources useless as the basis for a decision to impair constitutional rights. 13/

13/ Though the government's brief refers to "57 passports revoked or denied in 1956," the source cited by the government refers to 1957, and alludes to 61, not 57, revocations or denials. But the uselessness of the 1957 data is the same (footnote cont'd on next page)

On the basis of essentially the same materials, the Court of Appeals concluded that "such evidence hardly amounts to a "substantial and consistent administrative practice...". Pet. App. 13a-14a & n.7. As to the summary figures presented concerning refusals in 1955 and 1956 (Govt. Br. at 40 n.30), the Court of Appeals held that "the rationale for these passport denials, however, appears only tenuously related to 22 C.F.R. §51.70(b)(4)'s concern with 'serious damage to the national security or the foreign policy of the United

---

(footnote cont'd from previous page)
as the 1956 data since the 61 cases include two very different kinds, those "deemed illegal" and those "prejudicial to the orderly conduct of foreign relations," with no further description.

States'". Pet. App. 13a n.7. 14/

The Court of Appeals decision can be affirmed without even looking beneath the surface of the government's seven examples which might charitably be said to have some relation to Sec. 50.70(b)(4). It is simply an exaggeration for the government seriously to contend that those seven examples across a span of seventy six years supply the necessary "substantial and consistent" practice which this Court demands, especially when the Court also requires a narrow construction of the Secretary's power

---

14/ Insofar as the Court agrees with our analysis, supra Point IB, that the regulation involved in Kent and Dayton is indistinguishable from §51.70(b)(4), and given the Court's conclusion in Kent that the history of the administrative practice was insufficient to support a finding of implicit Congressional authorization for that regulation, all pre-Kent practices are irrelevant to a decision on authorization in the case at bar.

where a constitutional right is at stake. Kent, supra; see also Schneider v. Smith, 390 U.S. 17 (1968), and cases cited therein.

Looking a bit more closely at some of the government's seven examples shows how worthless they actually are. It also shows how dangerous to liberty it would be to allow the Secretary of State to exercise the overbroad power asserted in Sec. 50.70(b)(4).

The first two examples of course have no reference at all to serious damage to national security or foreign policy. They both involve run-of-the-mill illegal conduct, found in Kent to be a valid basis for refusal of a passport, as is made clear in a memorandum concerning the 1906 Brown case sent by the Third Assistant Secretary of State, Huntington Wilson, to the Consul-General

in Egypt who refused Waldberg's passport application in 1907:

> If the passport is desired to accomplish a criminal purpose, it would be properly refused....If a passport were in itself a certificate of citizenship, and if the inability to produce a passport carried with it the loss of protection, it might well be argued that Brown is entitled to a passport irrespective of his conduct, misconduct, or the interests of the United States. If, however, protection is not dependent upon passport, but that in a proper case an American citizen in a foreign land will be protected, it follows that the existence or nonexistence of a passport does not affect the status of the person without it in his relation to the home government.

1907 Foreign Relations of the United States, Pt.2, at 1080. Both the 1906 and the 1907 denials were based on the Department's unwillingness "to give a letter of introduction and request good offices" for those engaged in notorious violations of foreign laws. Id. at 1076-1080. In both cases, the Department determined before approving the denials that a passport was not legally or practically necessary to the applicant's protection or continued residence abroad. Id. In other words, while the

Department was unwilling "to make itself a party to such misconduct" in the 1906 and 1907 instances, it was not willing to, and did not, impose actual travel controls. These early examples thus do not provide support for the actions taken here since, as petitioner points out, respondent's continued residence abroad may well depend upon his possession of a passport. Br. 53. See infra at 48-49 (discussing 1899 case where passports not denied where required for continued residence abroad).[15/]

15/ Petitioner bases its discussion of the 1906 and 1907 examples on published State Department documents. Information on the other cited cases, however, is largely derived from news accounts and law review articles written long after the events in question. Petitioner claims that it failed to maintain records of its passport practices. Respondent, and this Court, are hampered by this lack of reliable evidence. It is also unlikely that Congress can have ratified a practice so amorphous that its history is non-existent.

The government's third case, involving the 1917 denial of passports to a group of Socialists, was justified at the time as involving a violation of the Logan Act, a criminal statute (Govt. Br. 30). Though the Logan Act does involve foreign policy, it is a specific criminal statute which would bring it within the Kent doctrine regarding authorization of passport refusal based on criminal activity.[15a/]

The 1921 passport denial (Br. 30) involved not national security but paroled criminals, and is clearly labeled by Hackworth as such. G. Hackworth, 3 Digest of International Law 504 (1942).

Petitioner also cites the 1948 denial of a passport to Rep. Leo Isacson as support-

---

15a/ Although petitioner correctly points out that passports were required for entry and exit during World War I, it cannot point to any specific passport denial or revocations on national security grounds during that or any other war.

ing its present claims (Br. 43). Rep. Isacson did have some difficulty in obtaining a passport in April of 1948. However, as he later reported to the House, he was able to secure a passport on April 23, 1948.

> After some difficulties with our State Department which resented my outspoken criticism of their betrayal of Israel, my passport was finally issued on April 23.
>
> 94 Cong. Rec. A5182 (1948).

The 1954 revocation of Col. Herbert Julian's passport (Br. 39) followed a similar pattern. Col. Julian received a new passport on July 2, 1954, only fifteen days after the revocation and after he had threatened legal action. New York Times, July 12, 1954, p.2. We are left with the single instance in 1970 where two citizens' passports were revoked on the authority of the same regulation as is in issue here and for purposes related

to national security and foreign policy.[16/]

We concede that the 1970 case is unambiguous. We deny, however, that a single, unambiguous refusal of a passport on national security or foreign policy grounds in 202 years is a "substantial and consistent" practice.

Though Kent and Zemel are explicit that it is the actual exercise of power over passports by the Secretary, rather than the mere expression of the power, which determines useable administrative practices (357 U.S. at 127, 381 U.S. at 11),[17/] the government

---

16/Plaintiffs were denied a temporary restraining order, and an emergency appeal to the Court of Appeals that same day was summarily dismissed. See Sirhan v. Rogers, diss'g. appeal No. 35364 (Sept. 11, 1970). Petitioner's reference (Br. 39) to affirmance by the Second Circuit is in error. A stipulation of dismissal without prejudice was entered on October 28, 1970, in the district court.

17/The Court of Appeals recognized that standard as controlling here. Pet. App. 15a.

also proffers to the Court self-serving opinions, Executive Orders, consular regulations, instructions, bulletins and regulations (Br. 26-28, 36-38), to buttress its otherwise flimsy case. The fact is, however, that respondent can show at least as many expressions of Executive opinion which renounce the power exercised here over Mr. Agee as the government can in support of that power.

Petitioner cites, for example, the opinions of Attorneys-General Hoar (1869) and Knox (1901) for the general proposition that passport issuance is a discretionary function. (Br. 27). Arrayed against the Hoar and Knox opinions, however, are the opinions of Taft, 15 Op. Attn'y Gen. 114, 117 (1876), Brewster, 17 Op. Attn'y Gen. 674 (1884), and Akerman, 13 Op. Attn'y Gen. 397, 398 (1871), which all support the view that passports are to be granted upon conclusive proof of citizenship. The State Department's own view of its discretion under the 1856 Act was ex-

pressed by Secretary of State Fish in 1875:

> I am of the opinion that any citizen of the United States has a right to be furnished with such evidence of citizenship, and of his right to the protection of his Government, as has been adopted for that purpose, upon complying with the usual regulations, and that the necessity therefore is a matter for the judgment of the party himself. A passport duly issued is the usual evidence of citizenship in a foreign land.
>
> Wharton, International Law Digest 465 (1886). See also Dept. of State, The United States Passport 141, 143 (1976); Dept. of State, Papers Relating to the Foreign Relations of the United States, 728 (1914)(Supp.)

In 1899 a consul at Chefoo, China inquired of a legation official in Peking as to whether he could refuse to issue passports to two "lewd" and "disreputable" women residing indefinitely in Port Arthur, which was then under Russian, not Chinese, jurisdiction. See 1899 Foreign Relations of the United States 185. The legation official authorized the refusal, but that order was overruled by Acting Secretary of State Adee (id. at 186-187):

While the statute vests in the Secretary of State the discretion to issue passports to citizens of the United States, which discretion has been delegated under appropriate regulations to the agents of this Department in foreign countries, the exercise of that discretion has been generally confined to requiring full establishment of the citizenship of applicants and of their conservation, in good faith, of the character of citizenship, to the end that the statute may be obeyed and that passports may issue to none but citizens. Their conduct or deportment has not been made the subject of discretionary regulation so far as the granting of passports is concerned. Their acts, if wrongful, are matters for the cognizance of the law of the place of their sojourn, or of the law of the United States, if any statute be applicable to their case. Even when accused of crime or offense in a foreign land, a citizen of the United States would be entitled, in case of need, to such certification of his status as a passport affords. There have been instances in the past where the Department has exercised its discretion to the extent of directing the refusal of passports to those whose conduct in another country was violative of the laws of the United States, as when, several years ago, passports were ordered to be denied to emissaries of the then polygamous Mormon sect who

were seeking to make proselytes in Germany, but such instances have been rare, and this course could obviously only be pursued under distinct warrant of law.

* * * * * * * *

The Department would not hold itself authorized to prescribe any conditions or qualifications of title to claim a citizen's passport other than those prescribed by law. Unless the refusal of a passport can be predicated on authority of law or of diplomatic instructions and regulations made pursuant to law, a passport may not be withheld from a bona fide citizen.

The foregoing considerations make me hesitate to sanction the action you report lest it might be found to work deprivation of rights of citizenship otherwise than in pursuance of judicial course, and so inflict a penalty without the jurisdiction to try and sentence.

In a 1929 cable to the Consul-General in Warsaw, the Department of State reaffirmed its adherence to the policies expressed in 1899 by Secretary Adee:

> The conduct or deportment of an applicant has not been made the subject of discretionary regulations...If a person has committed a wrongful act, it is the view of the Department that it is a matter for the cognizance of the law of the place of their sojourn abroad, or, if in the United States, or

> the law of this country. Even when accused of a crime or offense in a foreign country, a citizen of the United States would be entitled to certification of his status as an American citizen.
> G. Hackworth, supra, at 502.

This policy was reiterated by a State Department letter of April 30, 1932:

> The Department has for many years taken the position that the conduct or deportment of an applicant for a passport should not, as a rule, be considered a justification for the refusal to issue such a document. It feels that the issue of an American passport should, so far as practicable, be conditioned solely upon the applicant's submitting to it appropriate documentary evidence that he is an American citizen. It is not believed that the Department should deviate from this long established policy. To do so, as suggested by Mr. Colden, would only result in placing upon the great preponderence of bona fide applicants for passports undue inconvenience, expense and delay in order to detect an infinitesimally small percentage of cases involving apparent bad faith, the merits of which cases could only be determined finally by resort to judicial proceedings.
>
> Ms. Department of State, file 251.11 Georgescu Constantine.
> G. Hackworth, supra, at 500.

The Secretary's lack of authority became even clearer as hearings progressed on the various post-Kent proposals introduced in Congress. Deputy Under Secretary of State Robert Murphy told a Senate Committee that

> [t]he Executive branch is convinced that our national security is threatened by the free issuance of passports to American supporters of the international Communist movement who wish to travel abroad. Without Congressional authority we cannot deny such passports.
>
> Hearings on Passport Legislation Before the Senate Foreign Relations Committee, 85th Cong., 2d Sess. 24 (1958).

Murphy further stated that the need for passport legislation was "urgent" because, under existing statutory authority, the Secretary had "no right and no ground to do other than to issue passports" to individuals going abroad "to aid the international Communist movement" -- and thus, under express Congressional findings, [18] to harm the

---

[18] See Internal Security Act of 1950, 50 U.S.C. §781(8), (9), and (15).

national security. Id. at 21. Had the Court in Kent and Dayton not held national security regulations in existence then unauthorized, there would have been authority for the denials Murphy urged.

This was also the position taken by President Eisenhower in his July 7, 1958 message to Congress:

> In recent years the Secretary of State has based his limitation of passports on two general grounds. The first of these has been that an applicant's travel, usually to a specific country or countries, was inimical to United States foreign relations. The second of the general grounds of denial has been that the applicant is a member of the Communist Party; is under Communist Party discipline, domination, or control; or that the applicant is traveling abroad to assist knowingly the International Communist Movement.
>
> Recently the Supreme Court limited this power to deny passports under existing law. It is essential that the government today have power to deny passports where their possession would seriously impair the conduct of the foreign relations of the

> United States or would be inimical to the security of the United States.
>
> Public Papers of the Presidents, Dwight D. Eisenhower, 1958, ¶161.

In hearings the following year, Murphy again stated that "[t]he critical problem of the moment, however, is to remedy the total lack of legislative authority to deny passports to really dangerous participants of the international Communist conspiracy." Hearings on Passport Legislation Before the Senate Committee on Foreign Relations, 86th Cong., 1st Sess. 53 (1959). Murphy also testified (id. at 59) that the Attorney General

> agrees with us that our most urgent current problem in the passport field is the lack of Congressional authority to deny passports to those persons in situations where information establishes that their travel abroad would constitute a real danger to the United States...We seek only the means to protect the United States by denying passports to those relatively few citizens who are knowingly engaged in the activities of the Communist conspiracy and whose

> travel abroad would thus be likely to impair the security of the United States.

Mr. Murphy similarly stressed the State Department's lack of authority in House Committee hearings:

> It should be emphasized that there is presently no Congressional authorization enabling the Department to deny passports to any member of the Communist Party, U.S.A. Any or all of them, those who have not already done so, could come in tomorrow and receive their passports merely by demonstrating their citizenship, except in the unusual case where they might also be a fugitive from justice or a law violator. Thus, a major aspect of the present danger is the total effect on the orderly conduct of our foreign policy and our national security involved in the completely unrestricted travel of as many proponents of the Communist conspiracy as it determines to have travel.

Hearings on Providing Standards for the Issuance of Passports and for Other Purposes Before the House Committee on Foreign Affairs, 86th Cong., 1st Sess. 46 (1959).

The Eisenhower and Murphy statements

flatly contradict the government's claim (Br. 44) that, after Kent, "the Executive Branch sought [only] congressional clarification of its authority." Obviously, it was seeking the authority itself, at least if the President of the United States and its Under Secretary of State are to be believed.

None of the post-Kent proposals was enacted by Congress.

Following President Kennedy's assassination, the State Department's passport policies were scrutinized by both Congress and the Warren Commission, because Lee Harvey Oswald had been issued two passports after his attempt to defect to Russia in 1959. Frances Knight, Director of the Passport Office, told the Commission that passports were regularly issued

> to individuals whose activities and past record of behavior are patently more detrimental to the security and best interests of the United States than any re-

> port or any record that we had in the file of Lee Harvey Oswald.

5 Hearings Before the President's Commission to Investigate the Assassination of President Kennedy 381 (1964). Ms. Knight further stated that the passport office had "no such authority" and was "not in a position" to determine "the good or bad behavior of United States citizens here or abroad." Id. at 378.

Similarly, in 1965 House appropriations hearings, a State Department spokesman stated that that agency "had no authority, no jurisdiction or responsibility" to evaluate passport applicants on national security grounds. Hearings on Appropriations for the Department of State for 1966, House Committee on Appropriations, 89th Cong., 1st Sess. 368 (1965) (Testimony of William Crockett, Deputy Under Secretary for Administration, Bureau of Security and Consular Affairs). The only instance where the State Department would "make an evaluation of anybody" would occur

in connection with potential employment. Id. at 369.

In summary, the history shows a handful of peacetime refusals of passports, virtually all of which involved criminal activity; recognition by the highest government officials after Kent that the Secretary of State had no power to refuse passports for reason of national security or foreign policy; and in the twenty two years since Kent -- a period of relentless foreign crisis including the Cold War, Berlin, Cuba and Vietnam -- only a single case of passport refusal (apart from the case at bar) on national security or foreign policy grounds (Govt. Br. 39). With that history behind it, Congress could not rationally be said, in either 1926, 1952, or 1978, to have ratified a "substantial and consistent" practice of passport refusals on national security or foreign policy grounds.

D. The History Of Travel Control Confirms That Congress Has Not Granted The Executive Authority To Impede The Travel Of A Citizen Whose Travels Abroad Are Allegedly A Threat To National Security Or Foreign Policy Interests.

Congressional authorization of direct infringements on the right to travel will not be "readily inferred," Kent at 129, and delegated powers that curtail or dilute the right to travel will be "construed narrowly." Id.[19/] Because there is no explicit legislative explanation of §211a, the Court has held that the primary evidence of Congressional intent in this field is Congressional knowledge and approval of administrative practice. Kent at 128, Zemel at 18. As we have shown, the administrative practice does not support the

---

19/The Court has regularly held that executive actions curtailing individual liberties are not permitted in the absence of clear Congressional authorization. See, e.g., Gutknecht v. United States, 396 U.S. 295 (1970); NLRB v. Fruit and Vegetable Packers, 377 U.S. 58 (1964); Greene v. McElroy, 360 U.S. 474 (1959); Duncan v. Kahanamoku, 327 U.S. 308 (1946); Ex Parte Endo, 323 U.S. 283, 300 (1944).

Secretary here.

To the extent that the Court looks beyond the administrative practice, as the Secretary invites it to do, it can only conclude that Congress has steadily refused to provide or approve the authority here invoked. The history of passport and travel controls, especially the discussions surrounding the legislative enactments in 1856, 1918, 1926, 1952, and 1978, demonstrates that the executive does not have national security travel control authority. The historical evidence supporting this conclusion is so strong that even Justice Clark's reading of the legislative history for four dissenting Justices in Kent supports respondent.

Because that history is quite lengthy, we summarize its salient points. First, since passports were not necessary for lawful travel abroad, the provision of authority to the Secretary of State in 1856 "to grant and issue passports" was not intended to, and did not, affect the right to travel.

Congress imposed only one condition -- springing from the very nature of the passport -- namely, that the applicant be a citizen of the United States. Consequently, passports were invariably given to citizens in peacetime as a matter of right, as Attorneys-General Ackerman and Taft and Secretarys of State Fish and Adee specifically noted.

In 1918, Congress enacted a travel control statute, after a debate in which it was agreed that only the wartime emergency justified abrogation of the right to travel. Attempts in 1920 to amend the Passport Act to require a passport for peacetime travel as part of a revenue measure, successful in the Senate, were overwhelmingly defeated in the House when it became apparent that the effect of requiring a passport might be to permit the Secretary to control travel as well. Enactment of the 1926 Passport Act must be read in light of Congressional understanding, clearly expressed in 1920, that the

limited discretion to "grant and issue passports" provided no authority to confine an individual to the United States.

Subsequent measures in 1941 and 1952, requiring passports during the war and Cold War emergency, were understood to be inapplicable in peacetime when enacted, and this Court held in Kent and Dayton that the 1952 measure did not grant the authority exercised there, and claimed here. Moreover, even if the 1926 and 1952 Acts could be construed to authorize travel control during a prolonged peacetime emergency, a construction urged by the dissent in Kent but rejected by the Court, they would still not provide the authority sought by petitioner, for Congress has repealed the provision requiring passports for travel during such emergencies. The 1978 measure generally requiring passports for travel was passed solely "to facilitate travel"; there is no indication at all of any Congressional intention to authorize travel control in 1978.

1. The Early History

During most of the history of this nation, Americans could travel without hindrance. "In time of peace a law-abiding American citizen has always been free to leave the country without the permission of the Government." 20/ Persons confined in prison or released upon bond, pending trial or appeal, were an exception to the general rule. Early in its history, the United States developed the practice of issuing passports but not with the object of controlling travel. 21/ They were issued not only by the Secretary of State but also by state and municipal authorities as certificates of identity. 22/

20/Department of State, The American Passport 3-4 (1898) (hereinafter The American Passport).

21/Reorganization of the Passport Functions of the Department of State, Senate Committee on Government Operations, 86th Cong., 2d Sess. 20 (1960) (Comm. Print).

22/The American Passport at 37-42.

To remedy abuses arising from the variety of different passports various jurisdictions had issued, Congress enacted in 1856 a measure to provide a statutory basis for issuing passports, and vesting that exclusive power in the Secretary of State. In its original form, the 1856 Act provided, in relevant part:

> That the Secretary of State shall be authorized to grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by such diplomatic or consular officers of the United States, and under such rules as the President shall designate and prescribe.... 23/

Congress explicitly imposed upon the right to a passport only one substantive condition, springing from the very nature of the passport -- namely that the applicant be a

---

23/11 Stat. 60 (1856), amended in 1866 (14 Stat. 54), in 1875 (Rev. Stat. §4075), in 1902 (32 Stat. 386), and in 1926 (44 Stat. 657), in respects not material to this discussion. It is now codified at 22 U.S.C. §211a.

citizen of the United States. 24/

Nothing in the 1856 Act authorized the Secretary of State to deny passports on national security grounds or to revoke passports for any reason, and the Secretary has not pointed to any evidence suggesting that Congress intended implicitly to authorize such power. Since passports were not necessary for lawful travel abroad, the act was not intended to, and did not, affect the right to travel. 25/ Senator Seward described the bill as a "convenience to Americans abroad." Cong. Globe, 34th Cong., 1st Sess. 1797 (1856). As

---

24/See generally Boudin, The Constitutional Right to Travel, 56 Columbia L.Rev. 47,53 (1956); Stowell, The Legal Adviser of the Department of State, 5 International Law and Relations 1,11 (1936); Webster, A Treatise on the Law of Citizenship in the United States 302 (1891).

25/See the General Instructions in Regard to Passports, September 1, 1873: "Citizens of the United States visiting foreign countries are liable to serious inconvenience if unprovided with authentic proof of their national character. The best safeguard is a passport from this Department, certifying the bearer to be a citizen of the United
(footnote cont'd on next page)

we have shown, this construction was explicitly recognized by Attorneys-General Ackerman and Taft, Acting Secretary of State Adee, and Secretary of State Fish during the latter part of the nineteenth century. 26/ See supra at 47-50.

(footnote cont'd from previous page)

States. Passports are issued only to citizens of the United States upon application supported by proof of citizenship." The American Passport at 54.

26/Petitioner's citation (Br. 27) to differing opinions by Attorney General Knox in 1901 is not persuasive, both because Knox's statement makes clear that he was referring to discretion to deny passports to "one of the criminal class," 23 Op. Att'y Gen. 509, 511 (1901), and also because Secretarys of State, not Attorneys-General, are charged with enforcing the Passport Act. Moreover, in evaluating pre-1918 assertions of authority to deny passports, it is important to recall that a passport was then a convenience, not a necessity for travel. Even granting the Department some discretion in determining whether to facilitate a citizen's travel, it would not follow that it may deny a passport where the purpose and effect is to confine him to the United States. The Court has repeatedly treated the refusal by government to facilitate a right very differently indeed from denial of the right itself.

(footnote cont'd on next page)

2. The 1918 Act

The Court has held that the "restrictive regulations" of wartime cannot be relied on to support petitioner's claim of peacetime travel control authority. Kent, at 128. 27/ We address the 1918 experience nevertheless because in fact it strongly tends in the other direction -- that is, it supports respondent's claim that Congress believed the 1856 Passport Act had not authorized the power sought here, and that the 1926 Congress intended neither to grant such authority nor to ratify its prior imposition.

(footnote cont'd from previous page) Compare Harris v. MacRae, 65 L.Ed.2d 784 (1980) with Roe v. Wade, 410 U.S. 113 (1973). In Kent, the Court held that denial of a passport, in light of modern conditions, is denial of the right to travel.

27/Nearly all of the area control examples canvassed in Zemel took place while the United States was not at war. See Zemel at 9-11.

In 1918 Congress enacted a statute which made it unlawful -- during wartime and after Presidential proclamation -- for any American citizen to enter or depart from the United States without a valid passport. Act of May 22, 1918, ch. 81, §10, 40 Stat. 559. The House Report accompanying the bill expressly notes that the executive had no pre-existing power, either inherent or from the 1856 Act, to control travel even to war areas: "new legislation is the only remedy." House Committee on Foreign Affairs, Control of Travel From and Into the United States, H. Rep. 485, 65th Cong., 2d Sess. 2 (1918). President Wilson's proclamation triggering the act marked only the second time in American history that passports had been required for entry and exit. 28/ The sponsor

---

28/During the latter part of the War of 1812 passports were only required for travel to enemy territory. Act of Feb. 4, 1815, c. 31, §10, 3 Stat. 199. During the Civil War a passport was required "to go abroad from a port
(footnote cont'd on next page)

of the legislation in the House, Rep. Flood, argued that the measure was urgently needed to curb wartime espionage and that any discretion granted would lapse when the war ended.

> When the war ends the regulations will end. There is no necessity of any passport in time of peace. Our law authorizes passports, but they are for the protection of the citizens who get the passports, who ask for them.
>
> We are asking for the passage of this law in order to protect the government and the country. Mr. Speaker, we have rules and regulations of the Department of State to control the travel to and from the country of American citizens, friendly aliens, and neutrals, but the rules and regulations go beyond the law and if there was a test made of them they could not be upheld.
>
> 56 Cong. Rec. 6066-6067 (1918).

(footnote cont'd from previous page)
of" or "to land in" the United States. The American Passport 50 (1898). According to the State Dept., these wartime cases "are exceptional....They need not enter into a correct defining of the regular American passport, a document sanctioned by more than a century of issuance and authorized by statute. In its wording this passport has not varied materially and in its purpose it has not varied at all." Id. at 4. That purpose was to ensure to the citizen "free passage." Id.

The authority granted in 1918 was intended to, and did, end with the coming of formal peace in 1921. See Act of March 3, 1921, c. 136, 41 Stat. 1359 (formal declaration of peace).

The State Department did not relinquish its wartime authority without a struggle. In 1919 the President and the Secretary of State urged Congress to enact legislation temporarily continuing for one year after a formal peace treaty the passport requirement for entry into the United States. See H.R. 9782, 66th Cong., 1st Sess.; 58 Cong. Rec. 7301 (1919). Rep. Linthicum, a supporter of such restrictions, stated his belief that the measure would prevent return of American citizens who had been abroad during the war and had "gone wrong" and had "become socialists or anarchists or disturbers...." Id. at 6974. The House Committee on Foreign Affairs, however, expressly deleted from the bill any peacetime travel controls. Id. at 6971 (remarks of Rep. Rogers).

H.R. 9782, as passed, continued travel controls over aliens, but not over American citizens. See Act of Nov. 10, 1919, ch. 104, 41 Stat. 353. As a leading supporter of the bill, Representative Connally said just before passage of the bill (58 Cong. Rec. 6976), "Americans should have the unrestricted right to [travel] without the requirement of passports." It is clear, then, that the 1919 Congress understood that the general language of the 1856 Act granted no authority to the executive to impose travel controls.

In one of a series of post-war attempts to raise governmental revenues, the Senate in 1920 attempted to amend the State Department appropriations bill already passed by the House (H.R. 11960) to raise passport fees. Because the measure would not raise revenue unless passports were a necessity, the Senate added a permanent passport requirement for peacetime travel without apparent notice of right-to-travel consequences. See 59 Cong. Rec. 7166 (remarks of Rep. Connally). The

House was angered by the travel restrictions the Senate had unwittingly countenanced, see generally 59 Cong. Rec. 7124, 7166-7175 (House), 7190-7191 (Senate), and the Senate amendment was decisively rejected after considerable debate. 29/ The House was "unwilling to enact a solemn law that makes the coming and going of a citizen -- a free man in a free country -- from or to his own home land in time of peace contingent upon the consent of some bureau of government." Id. at 7166 (remarks of Rep. Connally); see also id at 7167 (remarks of Rep. Siegel). The conference report (H. Rep. 985, 66th Cong., 2nd Sess.) containing the Senate amendment was rejected by a vote of 194 to 97, id. at 7175, and the 1920 appropriations bill was enacted without the travel control amendment. Id. at 7748-50; Act of June 4, 1920, ch. 223, 41 Stat. 739.

29/ National security considerations were raised. See, e.g., 59 Cong. Rec. 7173 (remarks of Rep. Begg)("the Government...has the right to--footnote cont'd on next page--

3. The 1926 Act.

Congress again turned its attention to passports in 1926. The existing passport law -- the 1856 statute, which merely authorized the Secretary to issue passports on the single condition of citizenship, and was clearly understood not to authorize national security travel controls -- was re-enacted with minor changes aimed primarily at enlarging the number of American diplomats who could issue passports. The 1926 measure was described on the floor, and by the State Department in committee hearings, as a convenience to foreign travelers. See 67 Cong. Rec. 11705 (1926); Hearings on Validity of Passports Before the House Committee on Foreign Affairs, 69th Cong., 1st Sess. (1926) (testimony of Asst. Secretary of State Wilbur Carr).

(footnote cont'd from previous page) exercise control of the man...who wants to travel abroad); id at 9407 (remarks of Rep. Flood) (urging travel control of individuals "liable by some action of theirs to involve this government in trouble....")

The Secretary concedes that the 1926 Act was intended to re-enact existing law, but nevertheless concludes that Congress must be taken to have authorized travel controls. To the contrary, if anything was clear in 1926, it was (1) that the 1856 Act had never been understood to authorize travel controls, 30/ (2) that Congress intended in 1918 to pass an emergency wartime measure that would terminate when the war was over, and (3) that three times in recent years (1918, 1919, and 1920) Congress had rejected administration-sponsored attempts to authorize peacetime travel controls, after debates focusing on the importance of safeguarding the right to travel. It would

---

30/Even those who argued that the 1856 Act provided discretionary control over passports, a position never asserted till 1901 and one we have challenged supra, conceded that the Secretary had no power to impede travel. See, e.g., Committee on Foreign Affairs, Hearings on Extension of Passport Control, H.J. Res. 205 and H.R. 9782, 66th Cong., 1st Sess. 38-39 (1919)(testimony of Wilbur J. Carr).

be extraordinary if those recent assertions of Congressional solicitude for the right to travel were ignored in 1926, and nothing in the legislative history, certainly not the petitioner's references (Br. 35), suggests that Congress had reversed itself on so important an issue. To the contrary, the 1926 Passport Act takes its meaning directly from the debates of 1918, 1919, and 1920, and must be understood in the context of a Congress hostile to executive attempts to control the peacetime travel of American citizens.

4. The 1941 Act

In 1941 the executive sought legislation to amend the 1918 Travel Act to require passports for entry and exit during the existing national emergency, proclaimed by the President on May 27, 1941. As in 1918, the measure was depicted as emergency legislation required to combat espionage. Senator Van Nuys, Chairman of the Senate Judiciary Committee and sponsor

of the bill, stated that the measure "would apply to Americans; but the main objective is to reach certain elements of aliens." 87 Cong. Rec. 5325 (1941).

Again, the debate reflected with clarity the Congressional understanding that the 1926 Passport Act granted the executive no power to impose travel controls. See, e.g., 87 Cong. Rec. 5050 (remarks of Rep. Jonkman). 31/

In a successful attempt to limit the discretion sought by the President, Senator Taft proposed that the provision which allowed passport restrictions in the event of war between any two nations be limited to travel restrictions on aliens, and that restrictions on the travel of American citizens be authorized only during wartime or the existing

---

31/The relevant portions of §211a have not changed since 1941, when Congress debated the war measure. Therefore, unless Congress has subsequently authorized peacetime travel controls -- and, as we show below, Congress has had no such intention -- the 1941 history, like the 1918, 1919, 1920, and 1926 history, conclusively establishes the petitioner's lack of authority here.

national emergency. 87 Cong. Rec. 5387 (1941). See also id. at 5387-5388 (remarks of Sen. Norris).

The Taft Amendment was adopted unanimously. Id.

As in 1918, therefore, Congress in 1941 was only willing to authorize travel control because of the pressing exigencies of world war and only on the condition that controls end when emergency conditions abated.

5. Post War Developments

In 1952 Congress repealed the 1918 Travel Act (as amended in 1941) and reenacted it to provide that a passport be required for entry and exit during "any national emergency proclaimed by the President..." 66 Stat. 190 (1952). That act, passed during the Korean War, simply continued the succession of wartime author-

izations.[32/] The Court in Kent and Dayton canvassed the legislative history and concluded that nothing in the 1952 Act, nor previously in §211a nor §1185(b), authorized peacetime national security denials or revocations.

Because the decisions in Kent and Dayton had so plainly held national security denials or revocations unauthorized, see

---

32/ Petitioner's broad construction of the 1952 Act, rejected in Kent, is based largely on his contention (Br. 41-42) that in 1952 Congress "instructed the Director of [the Passport Office] 'to maintain direct and continuous liaison with the Directors of the Federal Bureau of Investigation and Central Intelligence Agency...for the purpose of obtaining and exchanging information for use in enforcing the provisions of this Act in the interest of the internal security of the United States'," quoting 8 U.S.C. §1105. That argument is either extraordinarily careless or a deliberate attempt to mislead the Court. Section 1105 was intended solely "to strengthen security screening of aliens coming to the United States, or residing therein, by providing a continuous flow of information between agencies...charged with the administration of immigration and naturalization laws...,"

(footnote continued on next page)

Point IB, supra, Congress was immediately urged to reconsider the subject of passports. We have previously canvassed the post-Kent history briefly to demonstrate the administrative understanding of and acquiescence in those decisions. Here, we review post-Kent legislative activities because the hearings and floor debates reveal a clear Congressional opinion that the Secretary did not possess the authority to deny or revoke passports on national security grounds, as the Court had held, and a clear refusal to grant the authority so strenuously sought.

(footnote cont'd from previous page)
and confers authority not on the Director of the Passport Office, but rather on the Commissioner of the Immigration and Naturalization Service and the Administrator of the Bureau of Security and Consular Affairs. Conf. Rep. 2096, 82nd Cong., 2d Sess., reprinted in 1952 U.S. Code Cong. and Adm. News 1688.

The legislative history begins, of course, with President Eisenhower's Special Message, which did not seek ratification of a power claimed, but rather grant of a power admittedly not possessed. See Public Papers of the Presidents, Dwight D. Eisenhower, 1958, §161, quoted supra at 47-48.[33/] On July 10, 1958, Senator Eastland, Chairman of the Judiciary Committee, stated that Kent and Dayton had "destroyed the right of the Secretary of State to use his discretion in the issuance of passports for the purpose

---

33/ Although petitioner argues that the failure of Congress to take action after Kent and Dayton is irrelevant (Br. 44-46), President Eisenhower's personal intercession and his express warning that he possessed no power to revoke passports on national security grounds makes this case far different from the scenario petitioner describes, under which the administration claimed power and simply wanted Congressional reaffirmation of it. The post-Kent history is also important because it shows express rejection of peacetime travel controls, as in 1918, 1919, and 1920. The Court has previously relied on the post-Kent failure to enact authority sought by President Eisenhower. United States v. Laub,
(footnote cont'd on next page)

of protecting the internal security of the United States....the Court says it is impermissible to deny a passport because its issuance would be contrary to the national interest." 104 Cong. Rec. 13335, 13337 (1958).

House sponsors of post-Kent legislation were equally quick to stress the Secretary's lack of authority to deny passports on national security grounds. In introducing H.R. 13760, which eventually passed the House, Rep. Selden stated that legislation was needed "to fill the gap that has resulted from the Supreme Court's decisions" in Kent and Dayton. Id. at 19654 (1958). According to Selden (id.), those

---

(footnote cont'd from previous page)
385 U.S. at 486. In a comparable case where after extensive consideration Congress denied authority sought by the President, the Court relied heavily on that denial as evidence that the authority did not exist. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1953), id at 597-609 (Frankfurter, J. concurring), id. at 637-41 (Jackson, J., concurring). See also New York Telephone Co. v. New York Labor Dept., 440 U.S. 519, 530, 540-544 (1979); Teamsters v. Morton, 377 U.S. 252, 259-60 (1964).

decisions

> held in effect that there is no law in being at the present time which authorizes the Secretary of State to deny passports to persons wishing to go overseas to engage in activities harmful to the United States, such as espionage, subversion of foreign governments, and propaganda.

Rep. Collier similarly argued (id. at 15823) that

> [T]he Court's ruling simply states that the Congress has not given the Secretary of State authority not to issue passports except in cases of definite proof that the applicant is fleeing from justice.

Rep. Morano pointed out that if passport legislation "is not enacted, we are faced with a situation in which persons may go abroad to subvert and thwart the foreign policy of the United States and to stir up trouble....It is a necessity. The bill grants authority to the Secretary of State to plug this loophole." 104 Cong. Rec. 19654-55 (1958).

The Secretary's lack of authority became even clearer as hearings progressed on the various post-Kent proposals. Senator Javits explained in 1959 that

> there is no legislation in this area, and...the courts held that legislation was required, and we haven't as yet passed any. We could have passed a resolution in 24 hours...which would have stopped any passport being granted to anybody where we had the remotest question, until we could put in definitive legislation, but we didn't...[u]nder the law the Secretary of State had no discretion in the matter.
>
> Hearings on Passport Legislation Before the Senate Committee on Foreign Relations, 86th Cong., 1st Sess. 40-41 (1959).

A comparison of the various passport bills introduced in the Senate, prepared by the staff of the Committee on Foreign Relations and inserted into the hearings record, stated that the Secretary of State was authorized by existing statutes to deny passports only if the applicant "1) does not owe allegiance to the United States;

2) is trying to escape criminal prosecution or is engaging in criminal conduct; or 3) is a member of a Communist organization under a final order to register issued by the Subversive Activities Control Board." Id. at 29-31. Accord, 107 Cong. Rec. 10327 (1960) (remarks of Sen. Lausche).

Congress did not grant the President and Secretary of State the discretionary authority they admittedly lacked. Congressman Hays of Ohio called the State Department's own draft bill (H.R. 13318), which would have authorized the denial of passports to those whose travel would "seriously impair the conduct of the foreign relations of the United States" or be "inimical" to its security, a "monstrosity....Any critic of the foreign policy of Mr. Dulles could have been barred from travel if Mr. Dulles saw fit, and he has seen fit to bar critics in the past....It might be well to note in passing that the Senate Committee refused

even to consider the [administration's] bill." Hearings on Denial of Passports to Persons Knowingly Engaged in Activities Intended to Further The International Communist Movement Before The House Committee on Foreign Affairs, 85th Cong., 2d Sess. 100-101 (1958).

Rep. Udall, in testimony before the same committee, noted that President Eisenhower had requested authority "to prevent Americans from using passports where their presence would conflict with our foreign policy objectives." That, Udall observed, "is a very broad request, and it seems to me that it runs counter to what the Supreme Court has said and to what our traditional position has been with regard to right to travel....To say that no one whose presence abroad is not in the national -- in the interests of the national security -- should be allowed a passport is the type of vague standard that I think the

committee should avoid." Id. at 72, 78.

Congress gave the proposed measures the serious attention that their importance and President Eisenhower's personal intercession warranted. Nevertheless, although two measures passed the House, none of the more than fifty passport bills introduced in Congress between 1958 and 1963 was enacted. T. Ehrlich, Passports, 19 Stan.L.Rev. 129, 141 n.59 (1966).

In 1966 the State Department again attempted to have enacted a comprehensive passport law, H.R. 14895, which would have authorized the Secretary to deny a passport upon determination "that the applicant's activities abroad are causing or are likely to cause serious damage to the national security or the foreign policy of the United States." Once again, the administration's proposals were not enacted.

6. The 1978 Amendments

The 1978 amendments are especially critical in deciding whether Congress has given the executive discretionary authority to impose travel controls on national security grounds, because, as past history shows, it is the requirement of a passport for travel which ensures that passport control produces effective travel control. However, in contrast to previous wartime impositions of the passport requirement, where Congressional debates demonstrated Congressional interest in travel control for national security reasons, a careful search of the 1978 legislative history fails to reveal any purpose other than the facilitation of travel. To the contrary, the 1978 history demonstrates Congressional intention to eliminate the principal remaining statutory bases for travel controls.

a. 8 U.S.C. §1185

The pre-1978 requirement that Americans carry passports upon entry and exit was linked via 8 U.S.C. §1185 to the existence of a national emergency, scheduled to lapse on September 14, 1978. See National Emergencies Act, Title I, §101, P.L. 94-412, 90 Stat. 1255 (1976), codified at 50 U.S.C. §1601. During a 1978 debate on the annual Foreign Relations Authorization Act, H.R. 12598, which contained no travel-related provisions, Rep. Eilberg offered an amendment to prevent

> the impediment [to travel] that will occur if the passport requirement is allowed to lapse.... Abandoning the passport requirement for United States citizens and nationals may result in many cases where travelers arrive at their destination only to discover that they are not allowed entry because they lack proper documentation. 34/

124 Cong. Rec. 4689 (daily ed. May 31, 1978).

34/In hearings on the National Emergencies Act the State Department's Deputy Legal Adviser had also stressed that dropping the passport requirement would hamper citizen travel. Hearings on H.R. 3884 Before the House Judiciary Committee, 94th Cong., 1st Sess. 82-83 (1976)(testimony of Mark Feldman). Mr. Feldman did not mention national security. Id.

Representative Eilberg emphasized the absence of any national security considerations behind this passport requirement by

> deleting the provisions in the administration's bill for an administrative penalty against persons who violate any provisions of section 215. The thrust of my amendment is to facilitate travel, not to obstruct it and cover it with penal overtones. Id.[35]

Congressman Fish expressly contrasted the administrative incursions on the right to travel in the early 1950s with the strong congressional protections of the right to travel represented by the 1978 amendments. Id. at 4690.

35/The Secretary's argument that the 1978 Congress ratified national security revocation authority is either careless or misleading. The passage he relies on (Pet. 16, Br. 47) was part of the Senate Foreign Relations Committee's attempt to explain the removal of area restrictions on travel in §211a, and has nothing whatosever to do with the §1185 amendment. In fact, the Senate Committee report from which the statement is drawn was printed and released two weeks before the §1185 amendment was even introduced in either house of Congress.
(footnote cont'd on next page)

Every Congressman -- Reps. Eilberg, Fish, Buchanan, Ashbrook, and Zablocki -- who commented on the §1185 amendment requiring passports agreed that its purpose was solely to facilitate travel. The amendment quickly passed without a roll-call vote. 36/

Even the Kent dissent, therefore, would be constrained to hold that the Secretary now lacks national security revocation authority. The dissent had found such authority in 1958 solely because it believed that the 1952 passport requirement was intended to author-

---

(footnote cont'd from previous page)
The quotation does have bearing on the very different provision removing the executive's area control power, but even there it does not stand for the proposition the Secretary urges, as restoration of the missing portion demonstrates. See infra at 94.

36/The Eilberg Amendment was incorporated verbatim by the Conference Committee, and passed without comment in the Senate. The Conference Report (No.95-1535), like the amendment itself, makes no reference at all to the Secretary's power to deny or revoke passports. In light of Kent's rule that an intention to infringe liberty will not be inferred, but must be clearly stated by Congress, see supra at 59 n.19, the history
(footnote cont'd on next page)

ize the emergency travel control previously instituted in wartime in 1918 and 1941. But even if that argument were accepted for the 1952 enactment of a national security-tied passport requirement, however, and it was squarely rejected in Kent, it is hardly germane to the 1978 imposition of the requirement, which the legislative history shows was intended to "facilitate travel," and which was part of a series of actions Congress took to eliminate wartime or emergency measures and to reduce executive discretion.

(footnote cont'd from previous page)

of the 1978 amendment forecloses any argument that Congress authorized travel controls in 1978. Had Congress intended to approve or strengthen executive authority in §1185, surely it would not have pulled the teeth from such authority by completely eliminating criminal penalties for its violation, penalties which had been partially upheld in United States v. Laub, supra.

b. 22 U.S.C. §211a

The 1978 State Department appropriations bill in the Senate included a travel-related provision largely withdrawing the area control restrictions Zemel had held authorized. The history of the enactment of that provision discloses clear Congressional opposition to travel controls and an intent to facilitate travel by removing travel restrictions.

Although the State Department itself had acknowledged a commitment to "the general principle of freedom of travel" following President Carter's abolition of area travel restrictions in 1977, the Senate committee believed that "the freedom-of-travel principle is sufficiently important that it should be a matter of law and not dependent upon a particular Administration's policy." S.Rep. No. 95-842, 95th Cong., 2d Sess. 14 (1978). In light of the Congressional deletion of area control authority in

§211a "[f]or the purpose of achieving greater United States compliance" with the Helsinki human rights accords, id. at 15, it is easy to understand the government's desire to brush over the 1978 amendments, and to focus instead on wartime measures. That the §211a amendment was passed as a piece of human rights legislation hardly helps the government in its attempts to restrict the international travel of a dissident.

The amendment was not debated on the Senate floor and was changed only slightly in conference committee to authorize area controls "where there is imminent danger to the public health or the physical safety of United States citizens", see S. Rep. 95-1535, at 45, reprinted at 1978 U.S. Code Cong. and Ad. News 2478. Except for countries "with which the United States is at war, [or] where armed hostilities are in progress," §211a authorizes no area control

restrictions for national security reasons; only threats to the individual safety of travelers themselves suffice. Id.

Although the Foreign Relations Committee report did acknowledge that "the passport authority should not be restricted in any way which would limit the President's ability to control the departure of United States citizens to foreign countries when such travel is inconsistent with a greater goverment interest," S.Rep. 95-842 at 14, see supra at 90 n.36, the report continues (where the government's brief stops quoting) to specify just which interests were at stake -- precisely the "greater interests" for which travel controls were held in Kent to have been authorized by Congress, namely "preventing a citizen who is seeking to avoid the judicial processes of the United States." S.Rep. 95-482 at 14. Nothing in the Senate Report or elsewhere in the 1978 legislative history indicates any congressional intention, much less a clear inten-

tion, to authorize individualized travel controls, a greater restriction on liberty, when it limited authority to impose the lesser restriction of area restrictions. 37/

In sum, the original grant of Congressional authority to "grant and issue" passports was not intended to confer on the Secretary discretionary power to control travel. At every juncture -- 1918, 1919, 1920, 1926, 1941, 1952, 1958, 1966, and 1978 -- Congress either plainly

---

37/The Congressional intention can also be measured by §603 of the bill, "International Journalistic Freedom," 92 Stat. 985. In words directly applicable to journalists such as respondent, Congress found that "news dissemination and the free flow of information across national boundaries are vital to international understanding and to healthy relations among countries," id. §603(a)(1). See remarks by Sen. Percy, 124 Cong. Rec. S9973 (daily ed. June 28, 1978). The Congressional intent behind the 1978 amendments was generally to further the flow and exchange of ideas, persons, and communication across national borders.

expressed an intention not to provide such authority in peacetime, or was silent in a way that cannot possibly confer on the Secretary the authority he seeks.

E. The Decision Below, Based Solely on Statutory Grounds, Does Not Interfere With The Executive's Ability To Conduct Foreign Affairs And Protect The National Security.

Petitioner consistently throughout this case has disclaimed any reliance on inherent executive power. He nevertheless complains (Br. 47-54) that the decision below "strays far from" principles affording the President "very delicate, plenary, and exclusive power" over the country's foreign affairs, citing United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936). Petitioner's argument would make sense if addressed to a holding that he lacked constitutional authority, as opposed to statutory authority, but it is irrelevant here. Petitioner does not dispute that the power to abridge freedom of travel is a Congressional power. Kent, supra, at 129. If the President does not believe law enacted by Congress provides sufficient power to undertake his responsibilities, his recourse is not with this Court, but with Congress, in which the

the Constitution has vested the entire law-making power. Thus, even if it were true that the decisions below impede the "conduct of foreign relations," the constitutionally sanctioned solution would be Congressional provision of the necessary authority to the Executive, subject of course to constitutional constraints.

That was the holding in Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579 (1952), where a comparable assertion regarding the President's foreign affairs and national security responsibilities was forcefully rejected by this Court. President Truman had seized the steel mills during the height of the Korean War to protect the national security, far more credibly than here. The Court nevertheless set aside the seizure as unauthorized by law, notwithstanding the President's express reliance on executive power, holding that even an emergency could not create powers that had not been duly conferred. Significantly, the Court relied

heavily on the fact that the powers used had been sought from, and refused by, Congress.[38/]

Nor did Judge Robb's opinion leave the President powerless in the absence of a formal indictment or Congressional action to supply the authority held lacking. See Pet. App. 16a n.10.[38a/]

38/ Justice Jackson, no opponent of strong executive powers, noted that the foreign affairs cases relied on by the Executive in Youngstown, including Curtiss-Wright and MacKenzie v. Hare, 239 U.S. 299, 311 (1915), support only executive actions in external affairs and not, as here and in Youngstown, abridgment of the rights of private citizens. 343 U.S. at 635 n.2. Summarizing the cases on executive powers, he observed: "When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb...Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject." Id. at 637-38.

38a/ No action has been taken to indict respondent. Indeed, on March 18, 1977, Attorney General Civiletti provided Mr. Agee's attorneys with a letter stating that the government had no intention of indicting him for his leading book, Inside the Company: A CIA Diary.

The procedural protections of the criminal law embedded in the Constitution are designed to prevent unjustified deprivations of liberty. Relying on Snepp v. United States, 444 U.S. 507 (1980), the government argues that it may disregard those procedures and summarily and drastically curtail respondent's liberty on tenuous "national security" grounds simply because it sees an "unacceptable risk" in instituting the criminal proceedings which would concededly justify revocation of respondent's passport under Kent. Unlike Snepp, however, this is not a contracts case. There has been no contractual violation which would justify invocation of the Court's common law powers to create an effective contractual remedy. Instead, petitioner here simply argues that

on specified administrative findings he may summarily and drastically abridge the right to travel. In such circumstances, at least in the absence of express Congressional authorization, petitioner cannot avoid on grounds of inconvenience the procedural safeguards of the criminal law, which permit full testing of the government's "evidence" by a jury and an opportunity for public vindication.

II. THE SECRETARY'S REVOCATION OF RESPONDENT's PASSPORT IS CONSTITUTIONALLY INFIRM.

Respondent has pressed three substantial constitutional challenges to the Secretary's revocation of his passport at every stage of this litigation. Neither of the courts below considered those challenges; both courts found the regulation unauthorized. If this Court reaches those constitutional questions, it must find that the revocation violated respondent's rights under the First and Fifth Amendments to the Constitution.

A. The Secretary's Revocation of Respondent's Passport Impermissibly Burdens His Right To Travel.

The Secretary argued below and suggests here that restrictions on right to travel are to be judged on a "rational basis test", and upheld so long as the limitation "is not arbitrary, capricious, or unreasonable", relying on Califano v. Aznavorian, 439 U.S. 170 (1978). That reliance is misplaced. The right of international travel is a

fundamental part of our liberty, Kent, Aptheker, and Zemel, supra, and administrative actions directly abridging it, as here, must be strictly scrutinized, and upheld only if they are narrowly tailored to further compelling governmental purposes. Aptheker requires this Court to set aside the regulation on which the revocation here is based if it is overbroad, irrespective of whether respondent's activity falls within some "core" of conduct which could be prohibited. Under the controlling authority of Aptheker, §51.70(b)(4) is plainly invalid on its face and as applied, and must be set aside.

As the Court observed in Kent, the right of international travel is a fundamental part of the liberty protected by the Fifth Amendment, and had been expressly guaranteed by Anglo-Saxon law at least since the Magna Carta. 357 U.S. at 125-126 and n.12. Aptheker v. Secretary of State held that direct abridgments of the right of international travel would be judged by the strict test accorded direct abridgments of the rights of

free speech and association. 378 U.S. at 508. The Court expressly held that "restrictions on the right to travel abroad" were to be judged by the "principle" of NAACP v. Alabama and Shelton v. Tucker. Id. at 507-508. See also Lynd v. Rusk, 389 F.2d at 945.

Califano v. Aznavorian has not overruled these precedents or withdrawn the firm constitutional protection they afford the right of international travel. That case simply applied the rule that unintended, "incidental" burdens on protected rights arising as a consequence of otherwise valid welfare statutes not aimed at the exercise of those rights will be upheld where no greater than necessary to accomplish the governmental aim.[39/] The "inciden-

---

39/ Thus, the Court in Aznavorian stressed that "the statutory provision in issue here does not have nearly so direct an impact on the freedom to travel internationally as occurred in the Kent, Aptheker, or Zemel cases. It does not limit the availability or validity of passports. It does not limit the right to travel on grounds that may be in tension with the First Amendment." 439 U.S. (footnote continued on next page)

tal" restriction in Aznavorian can hardly be compared with or judged by the same standard as the regulation here, which is not an unintended and unavoidable burden on the right to travel, but rather a direct, intentional curtailing of that right.

We turn, then, to judging §51.70 and the revocation by the standards required by Aptheker. Under that test, it is clear that §51.70 must be set aside because it is not narrowly tailored to further a compelling governmental interest without "unduly...infring[ing]" the right to travel. Aptheker, 378 U.S. at 509.[40/]

(footnote continued from previous page) at 177, 58 L.Ed.2d at 442. The Court contrasted legislation directly interfering with protected liberty, with that indirectly burdening it, by comparing Califano v. Jobst, 434 U.S. 47 (1977)(incidental restriction arising from welfare benefits restriction upheld) with Zablocki v. Redhail, 434 U.S. 374 (1978)(direct infringement struck down.) See 439 U.S. at 177 n.6.

40/ Aptheker makes clear that the Court treated the challenged statute as a restriction on travel, not on speech or association, and applied overbreadth analysis to direct infringements of the right to travel generally. See 378 U.S. at 507-508, 515-517.

First, §51.70 permits revocation on a substantially overinclusive standard. The overbreadth of the regulation is sufficiently made out by reference to the extraordinarily broad historical practices petitioner labels "national security" denials to support the denial here, including denials of passports to common parolees whose presence abroad would interfere with "international comity",[41] and to blackmailers whose presence abroad would "disturb relations of this country with the representatives of foreign countries."[42]

41/ See Govt. Br. 30, discussed supra at 44.

42/ See Govt. Br. 30, discussed supra at 41-42. Indeed, the Department of State compilations of passport revocations submitted to the courts below and relied on here reflects a single category of "Participants in political affairs abroad whose activities were deemed abroad has been such as to bring discredit on the United States and cause difficulty for other Americans (gave bad checks, left unpaid debts, had difficulty with police, etc.)." See supra at 38. All of the revocations in this category are deemed by the Secretary to support, as a matter of practice, the regulation challenged here.

Second, revocation is permitted on a determination that an individual is "likely to cause serious damage to the...foreign policy of the United States." 22 C.F.R. §51.70(b). The regulation is not limited to harm to national security. And the judgment that someone has "damaged" our foreign policy, rather than "aided" it (or is "likely" to do so) is frequently a matter of political opinion, of commitment to orthodox views, and is certainly susceptible to abuse. The Court has never sanctioned the abridgment of liberty on so flexible a standard. Compare New York Times v. United States, 403 U.S. 713 (1971).

The Secretary's standard would have justified revocation of passports of American journalists in Vietnam, or of those gathering information on the attempted Bay of Pigs invasion.[43/] The regulation could on its face

---

43/ Significantly, President John F. Kennedy commented that he wished the New York Times had not heeded his warnings that reporting of the Bay of Pigs invasion would harm our foreign policy, and printed its story in dis-
(footnote continued on next page)

bar critics of American foreign policy from travelling abroad to influence international opinion against current administration policies on a range of issues - NATO policy, nuclear power policy, detente. Yet plainly such reporting is protected by the First Amendment. Far from being subject to administrative proscription (which is what the revocation of a journalist's passport amounts to), it is precisely part of the flow of information needed by citizens to undertake intelligently their responsibilities of citizenship. The very existence of this sweeping regulation impermissibly chills protected activity and requires invalidation by the Court.

Third, the regulation authorizes total revocation, even though an order barring use of the passport to a particular country or countries, or for a particular purpose, would

(footnote continued from previous page)
regard of that warning. What was thought certain to "damage" foreign policy, in hindsight, would have aided it.

serve the government's goal. Surely not everything that Mr. Agee does abroad, or everywhere he travels, causes "damage" which the Secretary may be empowered to reach. Under Lynd v. Rusk, 389 F.2d at 943, §51.70(b)(4) as applied is unconstitutionally over-restrictive of respondent's Fifth Amendment rights. See also Aptheker v. Secretary of State, 378 U.S. at 511-512 ("under the statute, it is a crime ...to apply for a passport to travel abroad to visit a sick relative, to receive medical treatment, or for any other wholly innocent purpose.") In short, even if the Court were to find the regulation authorized, the interest asserted by the government would only justify the partial invalidation of his passport for travel, for example, to the Islamic countries where the government has claimed special risks of Mr. Agee's travel exist. To the extent that he uses his passport for travel to other countries, or for other purposes, the government has not even suggested

any interest that restricting such travel would serve.

Aptheker establishes respondent's standing to urge overbreadth. The dissent there strenuously argued that even if the challenged statute were overbroad, appellant's travel could be curtailed because it was at the core of proscribable conduct under express Congressional findings, see 378 U.S. at 521-525, and the Court squarely rejected that argument, 378 U.S. at 517, striking down the regulation for cutting too deeply into protected liberty without even inquiring whether the well-known Communist Party leaders before it posed actual danger to the national security. The holding of Aptheker is squarely controlling here. An overbroad restriction on freedom of travel is invalid, regardless of whether the travel of persons to whom it is applied could be constitutionally proscribed. Respondent agreed not to contest the Secretary's "determination" for purposes of the motion for

summary judgment on the constitutional questions (JA 23-24) precisely because Aptheker rendered even a true factual concession irrelevant (as were the congressional findings regarding the danger to national security posed by travel of Communist Party leaders.[44/] As the dissent in Aptheker noted, the leaders of the Communist Party seeking passports in that case had not contested the Congressional findings terming their travel, in substance, an extremely serious danger to the national security. 378 U.S. at 521-525. Therefore, even if Mr. Agee could be thought bound by the Secretary's charges here, he is in precisely the position of the appellants in Aptheker and similarly entitled to challenge the regulation on its face for overbreadth. If the regulation is invalid, its defects are not affected by the respondent's decision not to challenge the Secretary's determination that he falls within its scope.

44/ Congress has expressly found that the "travel of Communist members, representatives
(footnote continued on next page)

Aptheker, 378 U.S. at 516-517.

B. Revocation of Respondent's Passport Was Intended to Harass, Penalize, and Deter His Criticism of United States Policies and Practices, in Violation of the First Amendment.

The denial or revocation of passports based on the exercise of activity protected by the First Amendment is constitutionally forbidden. The revocation of respondent's passport was intended to deter him from criticizing American foreign policy and intelligence activities, and violates the First Amendment proscription of governmental actions designed to prevent individuals from exercising their right to engage in political speech.[45/]

(continued from previous page)
and agents" furthered the purposes of the Communist movement which was "a clear and present danger to the security of the United States and to the existence of free American institutions." Internal Security Act of 1950, 64 Stat. 993, 50 U.S.C. §781(8) and (15).

45/ Governmental actions such as this, aimed at the communicative impact of speech and motivated by an intent to control or penalize it, are judged by the most exacting First Amendment standards. See generally Tribe, American Constitutional Law,
(footnote continued on next page)

A First Amendment challenge to area restructions in Zemel was rejected largely because "the refusal to validate appellant's passport does not result from any expression or association on his part...." 381 U.S. at 16. The Court emphasized the special First Amendment dangers of refusals "based on the character of the particular applicant." 381 U.S. at 13. Here, however, petitioner seeks to justify revocation precisely because of respondent's "expression" and "association." Indeed, petitioner relied upon respondent's "public allegations"--whose truth is not even denied--as the sole basis for revocation. See Newsom affidavit, ¶¶3-5, CA App. 36-37. The First Amendment denies the government power to deter the lawful collection,

(footnote continued from previous page)

at 584-588, 591-94 (1978). Judge Gesell has denied the government's motion to impose a constructive trust over the proceeds of Mr. Agee's books in a related lawsuit because he found a serious "factual issue as to whether the Government's past enforcement has been clouded by content considerations rather than wholly legitimate concerns for security." J.A. 39-45.

publication, or dissemination of information, even if the government believes foreign policy or national security will be damaged, and this is particularly so in the absence of explicit Congressional authority.[46/] See New York Times v. United States, supra.

Petitioner's attack on the First Amendment by the revocation is a far more direct subversion of the right of free speech than was the statute condemned in Aptheker v. Secretary of State, supra. It has never been suggested, to our knowledge, that public statements of fact criticizing foreign

---

46/ Petitioner has properly not relied on Snepp v. United States, 444 U.S. 507 (1980), as a basis for the revocation, and could not now do so. SEC v. Chenery, 332 U.S. 194, 197 (1947). Moreover, the relief sought by petitioner--the total revocation of respondent's passport for all purposes whatsoever--is far greater than Snepp or general equitable principles would permit. See Dayton v. Brinkman, 433 U.S. 406-420 (1977). Nor has petitioner relied on the unlawfulness of respondent's speech. See supra, at 99n.38a.

policy and its execution can be the basis for deprivation of fundamental liberty. Petitioner is trying to force respondent into precisely the choice repeatedly condemned by this Court in Kent, Aptheker, and again in Zemel: a choice between his First Amendment activity and freedom to travel. See generally Zemel, 381 U.S. at 16. The Constitution denies government the power to put Americans to that choice, securing both liberty of travel and freedom of speech.

Petitioner's reliance on Zemel is unpersuasive. The restricted flow of information in Zemel arose as an incidental and unintended consequence of a regulation applied to all citizens, regardless of their views. Here, petitioner's revocation of respondent's passport was intended as a direct abridgment of his speaking and journalistic activities abroad. Zemel expressly distinguished cases such as respondent's

from the uniformly applied area travel restrictions at issue there. See 381 U.S. at 13, 16.[47/]

C. Summary Revocation of Respondent's Passport Prior to Any Notice or Opportunity to be Heard Violates The Due Process Clause of the Fifth Amdendment.

Even if the full hearing provided for by the regulations could in the circumstances of this case have followed summary revocation, the failure to afford respondent any of the basic rudiments of due process, notice, and an informal opportunity to be

---

47/ Petitioner's argument that it seeks only to restrict respondent from traveling, not from the exercise of First Amendment activity, is disingenuous. Respondent's travel is viewed as dangerous only because of the "public allegations" he is expected to make. Surely petitioner does not believe, nor has it argued, that travel by respondent with his family for leisure or non-business purposes would be a danger to American foreign policy or national security. Petitioner's goal is precisely and solely to prevent respondent from publicly speaking abroad. The proceedings in respondent's FOIA case also evidence the government's intent to enjoin respondent's speech. See supra, n.45.

heard prior to summary revocation, violated his right to procedural due process.

The first that respondent heard of any governmental plans summarily to revoke his passport was the delivery to him on Sunday morning, December 23, 1979, of a letter from the American Consul in Hamburg advising that his passport was "revoked." The effect of that revocation was immediate and severe, an irremediable "grievous loss" of the fundamental constitutional right to travel secured and protected by the Fifth Amendment, for at least as long as the "revocation" was not overturned. He was immediately prevented from traveling outside West Germany. Moreover, as the government knew, revocation also altered his status as a resident of West Germany under German law, subjecting him to the risk of deportation. Yet respondent was not given any advance warning or notice, informal or formal, or opportunity to be heard. He was not advised, before effective summary revocation, of the

grounds on which the Secretary proposed to take such action. Nor was he offered an opportunity to respond to such grounds, to allay the Secretary's doubts or fears as to the safety of our national security or foreign policy, by stating his side of the "facts" relied on by the Secretary. Under the circumstances of this case, effective revocation prior to such usual safeguards as notice and an opportunity to be heard violates the right to procedural due process guaranteed by the Fifth Amendment.[48/]

The keystone of due process is:

> The fundamental requirement...[of an] opportunity to be heard at a meaningful time and in a meaningful manner.

Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (citations omitted). "What process is due" depends on a number of factors, and in some circumstances a full hearing may follow temporary action, so long as the individual

---

48/ This was the holding nearly twenty-five years ago in Bauer v. Acheson, 106 F.Supp 445 (D.D.C. 1952)(three-judge court).

affected can be later made whole should the initial decision prove unjustified. But even where it has rejected the necessity of a full evidentiary hearing prior to initial termination, postponing such hearings until after summary action, the Court has insisted on the fundamentals of prior notice and opportunity to know and respond to the evidence on which charges are based. See, e.g., Mathews v. Eldridge, 424 U.S. 319, 338 (1976) (due process prior to disability benefit termination satisfied by notice of proposed termination, summary of evidence on which action will be based, opportunity to respond in writing and to present additional evidence); Goss v. Lopez, 419 U.S. 565 (1975) (due process prior to school suspendion requires oral or written notice, and explanation of decision-maker's evidence, and opportunity to present own story); Fuentes v. Shevin, 407 U.S. 67 (1972); Bell v. Burson, 402 U.S. 535, 540 (1971); North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S.

601, 607 (1975); Arnett v. Kennedy, 416 U.S. 134, 142-46 (1974); University of Missouri v. Horowitz, 435 U.S. 78, 85-86 (1978); Id. at 97 (White, J. concurring); Mackey v. Montrym, 443 U.S. 1, 13-15(1979) (due process requires "[A]t the very least ...informal opportunity to tell her side of story" and notice); see generally 2 Davis, Administrative Law Treatise §11:12 (2d Ed. 1979). Respondent too is entitled to the relatively informal, but vital process that was afforded in each of those cases prior to effective deprivation of "life, liberty, or property" to ensure a reliable decision, even if he was offered a later full dress hearing.

Analysis of the factors relevant to determining what process is due shows plainly that his right to due process was violated. See generally Mathews v. Eldridge, 424 U.S. at 341-348.

The first factor is the nature and

weight of the private interest affected. The summary revocation immediately and severely abridged respondent's liberty, altered his legal status as a resident of West Germany, subjected him to risk of deportation, and prevented his free movement.

The second part of the Eldridge inquiry involves consideration of the likelihood of erroneous deprivation. As opposed to those cases involving relatively objective facts,[49/] respondent's passport was revoked on the basis of an amorphous judgment concerning the "danger" he presented to the "national security" or to our "foreign policy", and speculation as to his future activities - specifically, whether he would continue the journalistic activities complained of, and whether depriving him of a passport would likely be effective in cen-

---

49/ See, e.g., Dixon v. Love, 431 U.S. 105 (1977)(fact of previous conviction); Mathews v. Eldridge, supra (medical facts).

soring his public speaking and writing. In this regard, Agee could well have provided information that would have radically changed the Secretary's decision - for instance, that whatever information he seeks to impart could be communicated from the United States, or from other countries not requiring a valid passport for entry. Moreover, summary revocation in fact was erroneously predicated on a report that "Mr. Agee had been invited to travel to Iran in order to participate in a tribunal involving the hostages in Iran." See Newsom Aff., CA App. 37, ¶4. That report was a total fabrication. See Agee Aff., JA 29 ¶¶5-7.

Finally, the third Eldridge factor to be considered is the governmental interest in summary procedure, as well as the administrative or fiscal burden from the substitute procedure sought.

The government argued below that its interest in "the preservation of the national security" justified its decision to offer a

post-revocation hearing. But the question is whether that interest, even if it could justify postponement of the full-dress hearing, also justified dispensing with even the bare rudiments of due process prior to summary action: notice, and an opportunity to be heard, the informal procedures afforded prior to summary action in Goss v. Lopez, Mathews v. Eldridge, and the other cases cited supra.

The record discloses no national security need for action more summary than would have occurred had an opportunity to be informally heard (but not a full trial-type hearing) been provided. The informal procedures whose deprivation is complained of could have been provided during the course of a day, at most, without possibility of harm to the "national security". As Judge Parker, sitting as motions judge, pointedly observed, the reasons relied on by the Secretary in the letter served on Mr. Agee are

not reasons justifying emergency action at all. To the contrary, when his passport was renewed in 1978, the Secretary was fully aware of his activities and the "damage" which in the government's view they had caused. Since respondent's activities have not changed, and in the government's view disclosure of the identities of CIA agents has always been dangerous, it is hard to justify the need for summary action on the Sunday prior to Christmas. The situation here is simply not the kind of "emergency" which has been held to justify summary deprivation of fundamental rights. See generally, Mackey v. Montrym, 443 U.S. at 21 n.1 (Stewart, J., dissenting). Nor would procedures whose denial plaintiff complains of cause fiscal or administrative burden as in Mathews v. Eldridge, and the Secretary does not contend otherwise.

In short, under the circumstances of this case, respondent was entitled to pro-

cedural protections prior to the effective summary revocation of his passport. Having been denied due process, the revocation was contrary to law and must be reinstated pending provision of due process.

CONCLUSION

For all the foregoing reasons the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

MELVIN L. WULF
CHARLES S. SIMS

Attorneys for Respondent

December 22, 1980

*Counsel wish to acknowledge the substantial assistance of Steven Perry, a third year law student at Yale Law School, in the research and preparation of this brief.